92-1088

No. _____

Supreme Court, U.S.
FILED
DEC 21 1992
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In The

Supreme Court of the United States

October Term, 1992

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,

Petitioner,

v.

STATE OF SOUTH CAROLINA, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In proceedings under defendants' Rule 56 motion, where the plaintiff in this claim for possession of land has established its legal title and a presumption of possession under the applicable statute of limitations, and the applicable substantive law requires the occupant defendants to prove each element of adverse possession by clear and convincing evidence in order to defeat plaintiff's legal title, did the Court of Appeals err in holding that Rule 56(c) and (e) shifts to the plaintiff the burden of coming forward with specific factual averments upon the moving defendants' filing of affidavits lacking specific evidentiary facts and containing only general conclusory statements of the elements of adverse possession; thereby relieving defendants of their burden of establishing a *prima facie* case of adverse possession under the substantive law?

PARTIES IN THE COURT OF APPEALS

Plaintiff is the Catawba Indian Tribe of South Carolina, a tribe of Indians that has resided in the State of South Carolina since time immemorial. The defendants are seventy-three (73) individuals and entities who claim some right, title or interest in portions of a 144,000 acre tract of land which comprises the Tribe's treaty reservation.[1] Defendants were initially named as representatives of a defendant class comprising more than 61,000

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[1] The named defendants are the State of South Carolina, Richard W. Riley as Governor of the State of South Carolina; County of Lancaster, and its County Council consisting of Francis L. Bell as Chairman, Fred E. Plyler, Eldridge Emory, Robert L. Mobley, Barry L. Mobley, L. Eugene Hudson, Lindsay Pettus; City of Rock Hill, J. Emmett Jerome, as Mayor, and its City Council consisting of Melford A. Wilson, Elizabeth D. Rhea, Maxine Gil, Winston Searles, A. Douglas Echols, Frank W. Berry, Sr.; Bowater Corporation; Bowater, Inc.; Catawba Timber Co.; Hoechst Celanese Corporation; Citizens and Southern National Bank of South Carolina; Crescent Resources, Inc.; Duke Power Company; Flint Realty and Construction Company; Herald Publishing Company; Home Federal Savings and Loan Association; Rock Hill Printing & Finishing Company; Roddey Estates, Inc.; Southern Railway Company; Springs Mills; J.P. Stevens & Company; Tega Cay Associates; Wachovia Bank and Trust Company; Ashe Brick Co.; Ashe Farms; Church Heritage Village & Missionary Fellowship; Nisbet Farms, Inc.; C.H. Albright, Ned M. Albright; J.W. Anderson, Jr., John Marshall Walker II, Jesse G. Anderson, John Wesley Anderson, III, David G. Anderson; W.B. Ardrey, Jr., Elizabeth Ardrey Grimball, John W. Ardrey, Ardrey Farms; F.S.

PARTIES IN THE COURT OF APPEALS – Continued

claimants; however, Plaintiff's Motion for Class Certification was denied and this action is proceeding against the named Defendants individually.

Barnes, Jr.; W. Watson Barron, Wilson Barron; Archie B. Carrol; Hugh William Close, James Bradley, Francis Lay Springs, Lillian Crandall Close, Francis Allison Close, Leroy Springs Close, Patricia Close, William Elliot Close, Hugh William Close, Jr.; Robert A. Fewell; W.J. Harris, Annie Harris; T.W. Hutchison, Hiram Hutchison; J.R. McAlhaney; Francis M. Mack, Jr.; Arnold F. Marshall; J.E. Marshall, Jr.; C.D. Reid, Jr.; W.R. Simpson, John S. Simpson, Robert T. Simpson; Thomas Brown Snodgrass, Jr.; John M. Spratt, Jr.; Marshall E. Walker; Hugh M. White, Jr.; John M. Belk; Jane Nisbet Good, R.N. Bencher, W. Olin Nisbet, III; Pauline B. Gunter; J. Max Hinson; W.T. McCorkle, Mary A. McCorkle; William O. Nisbet; Eugenia Nisbet White, Mary Nisbet Purvis, E.N. Martin; Robert M. Yoder.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, entered on September 22, 1992.

OPINIONS BELOW

In 1982, the District Court granted defendants' (respondents') Motion for Summary Judgment and dismissed this action. *Catawba Indian Tribe of South Carolina v. State of South Carolina*, No. 80-2050 (D.S.C. June 14, 1982)

(unreported).[2] The Court of Appeals reversed the District Court's decision and remanded the action. *Catawba Indian Tribe of South Carolina v. State of South Carolina,* 740 F.2d 305 (4th Cir. 1984) (*en banc, per curiam*) (adopting panel opinion in 718 F.2d 1291 (4th Cir. 1983)). This Court reversed the Court of Appeals and remanded the case to the Court of Appeals. *South Carolina v. Catawba Indian Tribe,* 476 U.S. 498 (1986) (Appendix D at 172a).

On remand, the Court of Appeals affirmed in part and reversed in part and remanded the case for further proceedings in the District Court. *Catawba Indian Tribe of South Carolina v. State of South Carolina,* 865 F.2d 1444 (4th Cir.) (*en banc*) (Appendix C at 132a), *cert denied,* 491 U.S. 906 (1989) (*Catawba II*).

On remand, forty-eight defendants sought summary judgment with respect to over 1,000 properties and the District Court granted summary judgment on each parcel for which summary judgment was sought and dismissed twenty-nine defendants from the case. *Catawba Indian Tribe of South Carolina v. State of South Carolina,* No. 80-2050 (D.S.C. July 19, 1990) (unreported) (Appendix B at 104a).[3] On September 22, 1992, the Court of Appeals affirmed in part, reversed in part, and vacated and remanded in part the decision of the district court. *Catawba Indian Tribe v. South Carolina,* No. 90-2446 (4th Cir.,

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[2] Because the opinions of the district court and the court of appeals which preceded this Court's 1986 decision in this case are not the subject of this petition, they have not been reproduced herein.

[3] Because the Appendices to the Judgment Orders of the District Court are not relevant to issues raised in this petition, they have not been reproduced herein.

September 22, 1992) (*en banc*) (Appendix A at 1a) (*Catawba III*).

JURISDICTION

The Court of Appeals entered the judgment sought to be reviewed on September 22, 1992. This Court has jurisdiction to review the final decision of the Court of Appeals under 28 U.S.C. §1254(1) (1976).

RULE TO BE CONSTRUED

The decision below construes paragraphs (c) and (e) of Rule 56 of the Federal Rules of Civil Procedure which provide:

> **(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
>
> **(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing

affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

This is an action by an Indian Tribe seeking to regain possession of a portion of the lands of its 144,000 acre treaty reservation and to recover trespass damages. Jurisdiction is conferred on the District Court by 28 U.S.C. §§1331, 1337 and 1362. The facts, the nature of the claim and the history of the proceedings are more fully set forth in prior decisions of the Court of Appeals and this Court, which are reproduced in the Appendix.

In its prior decision in this case, this Court held that the state statute of limitations applied to the Tribe's claim and commenced to run against the Tribe on July 1, 1962,

the effective date of the Catawba Indian Tribe Division of Assets Act of 1959, 73 Stat. 592, 25 U.S.C. §§931-938. *South Carolina v. Catawba Indian Tribe,* 476 U.S. 498, 510-511 (1986) (Appendix D at 186a-187a). On remand from this Court, the Court of Appeals held that under the substantive law of South Carolina, the Tribe, for purposes of defendants' summary judgment motion, holds the legal title to the disputed land and is therefore presumed to be in possession. The legal title holders' presumption of possession may be defeated only by a person who holds and possesses property that has been held and possessed adversely to the Tribe's legal title for ten years after July 1, 1962 (the effective date of the 1959 Catawba Act) and before October 28, 1980 (the date this suit was commenced), without tacking except by inheritance in accordance with South Carolina's tacking doctrine. The Court of Appeals remanded the action. *Catawba II, supra* (Appendix C at 132a).

On remand, the District Court proceeded to a determination of which defendants could establish entitlement to summary judgment under Rule 56 Fed.R.Civ.P. based on a showing they had adversely possessed the claimed parcels for a period of 10 years without tacking under §§15-3-340 and 15-67-210 Code of Laws of South Carolina (1976). Forty-eight (48) defendants filed affidavits and title documents in support of their adverse possession claims to certain parcels. The Tribe filed affidavits in opposition, basing its opposition to summary judgment in large part upon the inadequacy of respondents' affidavits to establish a *prima facie* case of adverse possession, as mandated by Rule 56 Fed.R.Civ.P. The Trial Judge granted summary judgment to all moving defendants for

all parcels requested, making certain findings, including the following:

> A defendant whose uncontroverted affidavit states or shows that he (or his predecessor) has continuously occupied or possessed the property for ten years (without tacking except by inheritance), has treated the property as his own, paid taxes thereon, maintained the property and taken steps to protect it against trespassers or others who might seek to use it or assert any claim to it, has demonstrated adverse possession of the property.
>
> A defendant whose uncontroverted affidavit states or shows that he (or his predecessor) continuously occupied or possessed property pursuant to color of title for ten years (without tacking except by inheritance) has demonstrated adverse possession of the property.

1st Judgment Order at 2 (Appendix B at 105a).

The Tribe appealed the District Court ruling because, among other things, it was contrary to well-established doctrine setting forth the burden of proof imposed by Rule 56 and was contrary to the substantive law of South Carolina, the controlling jurisdiction. With regard to these issues, the Court of Appeals affirmed the District Court holding that:

> a claimant who produces affidavits or other sufficient documents establishing without contradiction in fact that he or a predecessor held the record title to the property, possessed, occupied or held the property, paid taxes on the property, and took steps to protect the property from trespassers for the requisite ten-year period without

> tacking except by descent, has met his burden under Rule 56(c) of establishing that there is no genuine issue as to any material fact and he is entitled to judgment as a matter of law. Therefore, in those cases where the claimant has so met his burden, to avoid summary judgment, the Tribe, by affidavit or as otherwise provided in Rule 56, must set forth specific facts showing that there is a genuine issue for trial.

Catawba III, supra (Slip op. at 9) (Appendix A at 11a-12a).

Under this ruling the Court of Appeals affirmed the grant of summary judgment for dozens of parcels of land based solely on affidavits wherein the sole substantive averment consisted of this statement:

> The property . . . has/have been occupied by the owner thereof as shown in the attached deed(s) for more than a period of 10 years without tacking between July 1, 1962 and October 20, 1980. In the course of this occupation of the property the owner thereof has at all times treated the property as his/her/its own, paid all taxes due thereon, maintained it and has taken steps to protect it against trespassers or others who might seek to use it or assert any claim to or dominion over it.[4]

Record Vol. 6 pp. C1-C177; Vol. 8, pp. R1-R499; Vol. 19, No. 21; Vol. 24, pp. 253-274 and 275-285; Vol. 25, Nos. 45-47.

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[4] Many other affidavits simply aver that the property was held for "investment," held as "lots," or "vacant land." Record Vol. 25, No. 52; Vol. 27, Nos. 63, 69, 72, 73, and 74; Vol. 30, No. 99.

The Court of Appeals ruled that the submission of these affidavits relieved respondents of their substantive law burden of proving by specific evidence a *prima facie* case of each element of adverse possession and shifted the burden of proof to petitioner. It invoked Rule 56(e) Fed.R.Civ.P. to require the Tribe to come forward in response with specific facts showing there was a genuine issue for trial.

REASONS FOR GRANTING THE WRIT

It is established that under South Carolina law, for purposes of respondents' summary judgment motion, the Catawba Indian Tribe possesses legal title to the disputed land and is therefore entitled to a presumption of possession. *Catawba Indian Tribe of South Carolina v. State of South Carolina*, 865 F.2d 1444 (4th Cir.), *cert. denied*, 491 U.S. 906 (1989) (Appendix C at 132a). South Carolina law favors the holder of the legal title, and mandates that the adverse claimant meet a high and exacting burden in order to defeat the legal title.

The Court of Appeals, however, improperly fashioned for this case new standards and minimized burdens under both the substantive law of South Carolina and Rule 56. Without analysis, it ignored the requirements of the law and held that merely submitting an affidavit that concludes, in essence, "I was in possession," suffices to meet respondents' initial evidentiary burden and shift to the Tribe the burden of demonstrating the existence of a genuine issue of material fact. But the burden may not be shifted so casually: the Tribe's legal title may be defeated

only by a clear and convincing showing of adverse possession. Only upon such a showing does the burden shift to the Tribe to come forward and demonstrate the existence of a genuine issue of fact.

The Court of Appeals disregarded an unbroken line of South Carolina Supreme Court decisions establishing unequivocally that the presumption of possession may be rebutted only by clear and convincing evidence of possession adverse to the legal title holder for 10 years without tacking. In addition, the lower court disregarded the comprehensive body of Rule 56 law that forbids the use of general conclusory affidavits from which conflicting inferences may be drawn and the rule of this Court that the burden of proof does not shift to the non-moving party until the moving party has shown the absence of any genuine issue of material fact.

The decision below stands on its head both the substantive law of South Carolina and the rationale of Rule 56. If this case had gone to trial and respondents had presented the same evidence that the Court of Appeals found adequate to support summary judgment, the Tribe would have been entitled to a directed verdict because respondents had not established a *prima facie* case of adverse possession.

A. The Question Presented Is One Of Extreme Importance.

The Court of Appeals' ruling effectively deprives Petitioner of its legal claim to thousands of acres of land by improperly shifting the burden of proof to the Tribe to

produce specific facts disputing generalized, mass-produced averments of adverse possession made by claimants who have not demonstrated a *prima facie* case under South Carolina's substantive law. In effect, any claimant who has held paper title for an unbroken 10-year period has been allowed a presumption of adverse possession which stands until the Tribe comes forward with specific facts to disprove the required elements of adverse possession.

In addition, the Court of Appeals' erroneous ruling may have implications far beyond the thousands of acres involved in this case. Because the Tribe's Motion to Certify a Defendant Class has been denied, *see In re Catawba Indian Tribe*, 973 F.2d 1133 (4th Cir. 1992), the Tribe may be required to proceed individually against the 61,767 occupants of the claim area. Although Congress has recently acted to suspend the running of the limitations period applicable to this claim until October 1, 1993,[5] if Congress does not act to resolve this claim before October 1, 1993, the Tribe will be required to proceed individually against the 61,767 paper title holders who claim title to the disputed lands. If such individual claims were filed, the Court of Appeals' ruling would allow those defendants, by filing inadmissible, conclusory allegations, to place on petitioner the burden of conducting massive and exorbitantly expensive discovery to ascertain the character and nature of each claimant's possession.[6] Only by resorting

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[5] Act of August 11, 1992, Pub.L. 102-339, 106 Stat. 869. (Appendix E at 211a).

[6] Should the Tribe proceed individually against the occupants of the remainder of the claim area, the expense of such

to this means could petitioner respond with the type of detailed factual affidavits the Court of Appeals has mandated.

B. The Court of Appeals Rendered an Erroneous Decision Radically in Conflict with the Settled Doctrine of South Carolina's Court Of Last Resort And Which So Far Departed From The Accepted and Usual Course Of Judicial Proceedings As To Call For The Exercise Of This Court's Power Of Supervision.

In both the District Court and the Court of Appeals the Tribe argued that respondents, in order to make out a *prima facie* case of adverse possession and thereby shift to the Tribe the burden of showing the existence of a genuine issue as to a material fact under Rule 56 Fed.R.Civ.P., were required to set forth specific actions upon the subject lands which they contended constituted an entry and a continuous possession thereof under the substantive law of South Carolina.

The lower court failed to recognize that the initial evidentiary burden imposed on respondents is dictated by South Carolina's substantive adverse possession law: "As to materiality, the substantive law will identify which facts are material." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). South Carolina law in this regard has long held that possession of property may only be found to

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discovery proceedings will largely fall upon the shoulders of the up to 62,000 claimants affected by this ruling in current and future litigation who will be required to compensate defense attorneys to respond to detailed interrogatories and document production requests.

exist where the circumstances on which it depends are shown. *Dickson v. Epps,* 104 S.C. 381, 89 S.E. 354 (1916); *Burnette v. Crawford,* 50 S.C. 161, 27 S.E. 645 (1897). The facts which denote possession must be proven and only when those facts are shown is possession established. *Dickson v. Epps, supra.* A witness may relate acts of possession or ownership but may not state who has been in possession. *Dickson v. Epps, supra; Burnette v. Crawford, supra.* Occupancy and possession are legal conclusions which may be arrived at only on a showing of facts which demonstrate possession. *Mullis v. Winchester,* 237 S.C. 487, 118 S.E.2d 61 (1961); *Weston v. Morgan,* 162 S.C. 177, 160 S.E. 436 (1936); *King v. Hawkins,* 282 S.C. 508, 319 S.E.2d 361 (Ct.App. 1984); *Dickson v. Epps, supra.* The South Carolina Supreme Court has specifically rejected the same type of conclusory averments approved by the Court of Appeals in *Fore v. Berry,* 94 S.C. 71, 78 S.E. 706 (1913) (holding that testimony that a claimant had been in possession of land openly, adversely, and exclusive of other rights and claims was of too general a nature to warrant an inference that the claimant possessed the tract and that this testimony was in the nature of conclusions of law).

In addition, South Carolina adverse possession law mandates that an adverse claimant show actual and continuous adverse possession. In order to show actual possession it must be shown that there was a trespass for which an action could have been brought against the claimant by the legal owner. *Clary v. Bonnett,* 114 S.C. 452, 103 S.E. 779 (1920); *Gregg v. Moore,* 226 S.C. 366, 85 S.E.2d 279 (1954). The evidence needed to establish such actual adverse possession is held to vary with each case,

depending upon the situation of the property and the uses to which it may be applied. *Lewis v. Pope*, 86 S.C. 285, 68 S.E. 680 (1910). Thus, in determining what amounts to actual possession of land, South Carolina courts have held that attention must be given to the nature of the land and the uses to which it may be put by the claimant. *Miller v. Cramer*, 48 S.C. 282, 26 S.E. 657 (1897). On this ground the South Carolina Supreme Court has repeatedly held that the quantity, quality and character of the claimant's activity on the land must be measured against the usual management of such property and, thus, has required proof of the nature and location of the land being claimed. *Mullis v. Winchester*, 237 S.C. 487, 118 S.E.2d 61 (1961); *see also Lawton v. Rivers*, 13 S.C. (2 McCord) 445 (1823) (testimony which failed to show the length of possession, whether the possession was continued or broken and how the property was used, was too weak and equivocal to present a jury issue on adverse possession). Adverse possession is ordinarily considered by South Carolina courts to be a question of fact for the jury and it is usually left for the jury to say whether possession is actual, open, exclusive, and notorious. *Terwilliger v. White*, 222 S.C. 176, 72 S.E.2d 169 (1952) (wherein the trial court rejected claimant's motion for directed verdict and for judgment notwithstanding the verdict because the evidence, though uncontradicted, was neither very precise nor very definite and, thus, made an issue to be passed on by the jury); *see also Mullis v. Winchester*, 237 S.C. 487, 118 S.E.2d 61 (1961); *Lyles v. Fellers*, 138 S.C. 31, 136 S.E. 13 (1926).

Lastly, adverse possession is an affirmative defense and is required to be proven, under South Carolina law,

by clear and convincing evidence. *Zinnerman v. Williams*, 211 S.C. 382, 45 S.E.2d 597 (1947); *Grant v. Grant*, 288 S.C. 86, 340 S.E.2d 791 (Ct.App. 1986). The proof of adverse possession must be strictly construed in favor of the owner of the legal title to the land. *King v. Hawkins*, 282 S.C. 508, 319 S.E.2d 361 (Ct.App. 1984).

The Court of Appeals ignored the overwhelming body of South Carolina authority cited by the Tribe and simply ruled that it disagreed with the Tribe's argument that an averment of possession is insufficient to establish possession for summary judgment purposes under Rule 56 Fed.R.Civ.P. *Catawba Indian Tribe v. South Carolina*, No. 90-2446 (Slip Op. at 10) (September 22, 1992) (Appendix A at 13a). The Court of Appeals failed to reveal the reasoning supporting its decision, reaching its conclusion without citation of authority or discussion. By failing to analyze or distinguish the applicable body of substantive law, the Court of Appeals departed from the usual and accepted course of judicial proceedings, and reached an erroneous decision that is in direct conflict with long-standing decisions of South Carolina's court of last resort on the issues of proof of possession and burden of proof of adverse possession.[7] Such a departure calls for the exercise of this Court's supervisory power to correct the lower court's erroneous decision.

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[7] As set forth *infra* at 17, the Court of Appeals decision also implicitly rejects this Court's ruling that Rule 56 affidavits be viewed "through the prism of the substantive evidentiary burden." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).

C. The Court of Appeals' Decision Conflicts With The Decisions of Other United States Courts of Appeals and With Applicable Decisions of This Court.

Not only did the Court of Appeals erroneously decline to follow the decisions of the Courts of Appeals for the Second, Third, Fifth, Seventh and Eighth Circuits regarding the evidentiary burden imposed by Rule 56 (c) and (e), it failed, as it did with the applicable substantive law of South Carolina, to analyze, discuss or distinguish the controlling decisional law in those other circuits. In those circuits, affidavits submitted under Rule 56 have been held to a standard requiring the assertion of specific facts, rather than ultimate facts or conclusions of law. The lower court's disregard of this fundamental standard is contrary to the principles governing the operation of Rule 56 established by this Court and other courts of appeals.

The Court of Appeals for the Seventh Circuit has held unequivocally that "ultimate or conclusory facts or conclusions of law cannot be utilized on a summary judgment motion," and that conclusory affidavits lacking specific evidentiary facts must be disregarded by the court in considering a motion for summary judgment. *Toro Co. v. Krouse, Kern & Co., Inc.*, 827 F.2d 155, 162-63, n.3 (7th Cir. 1987); quoting *10A Wright, Miller & Kane, Federal Practice & Procedure*, § 2738 at 486-89 (2nd ed. 1983); *accord Aldahonda-Rivera v. Parke Davis & Co.*, 882 F.2d 590, 594 (1st Cir. 1989); *Union Insurance Soc. of Canton, Ltd. v. William Gluckin & Co.*, 353 F.2d 946, 952 (2nd Cir. 1965); *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223, 226 (8th Cir. 1990). The Second Circuit has held that "[r]ule 56(e) requires that the moving party meet its

burden by submitting affidavits made on personal knowledge, which set forth admissible evidentiary facts. . . . " *Schiess-Froriep Corp. v. S.S. Finnsailor,* 574 F.2d 123, 126 (2nd Cir. 1978); *see May v. Department of Air Force,* 777 F.2d 1012, 1016 (5th Cir. 1985), *reh'g denied,* 800 F.2d 1402 (5th Cir. 1986).[8]

The court below failed to recognize that Rule 56 affidavits must set forth facts, not opinions or conclusions, and that affidavits that are essentially conclusions and lacking in specific facts are inadequate to satisfy a movant's burden. *Maldonado v. Ramirez,* 757 F.2d 48, 51 (3rd Cir. 1985). Statements of ultimate fact and conclusions of law are uniformly held inadequate to support or defeat a motion for summary judgment. *Leonard v. Dixie Well Service & Supply, Inc.,* 828 F.2d 291, 295 (5th Cir. 1987).

The Court of Appeals' decision squarely conflicts with this Court's plain ruling that the party opposing a motion for summary judgment bears the burden of responding *only* after the moving party has met its burden of coming forward with proof of the absence of any genuine issue of material fact: "No defense to an insufficient showing is required." *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 161 (1970). This Court has held that the substantive law will identify which facts are material and that if

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[8] The court below also declined to follow its own decisions setting forth the evidentiary requirements under Rule 56. *See, e.g.,* Barwick v. Celotex Corp., 736 F.2d 946, 960 (4th Cir. 1984) (rejecting sufficiency of conclusory affidavit not based on personal knowledge and setting forth no specific facts).

the applicable substantive law imposes a heightened burden at trial, that heightened standard must be met for purposes of consideration of a motion for summary judgment under Rule 56 Fed.R.Civ.P. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In *Anderson*, this Court held that the clear and convincing standard of proof applied to summary judgment: "in ruling on a motion for summary judgment, the judge must view the evidence through the prism of the substantive evidentiary burden." *Id.* at 254. If that is the rule where the nonmoving party has the burden of proof at trial, then it must also be the rule where, as here, the moving party bears the burden at trial. Yet the Court of Appeals found no error in the Trial Judge's rejection of the clear and convincing standard of proof as the burden to be met by defendants on summary judgment.

The Court of Appeals' sanctioning of the use of general conclusory affidavits to establish entitlement to summary judgment, even though respondents had the burden of proving adverse possession by clear and convincing evidence, constitutes a clear departure from the principles espoused by this Court and by other United States Courts of Appeals regarding the burden of proof imposed by Rule 56. The critical importance of maintaining a clearly enunciated standard by which Rule 56 affidavits are judged, when a party's fundamental right to a trial on disputed issues of material fact is involved, constitutes compelling justification for this Court to issue a Writ of Certiorari to the Court of Appeals.

CONCLUSION

For the reasons above stated, the decision below is fundamentally flawed and in conflict with the decisions of this Court, the decisions of other United States Courts of Appeals and with the substantive law of the State of South Carolina. For these reasons, this Court should grant the petition for certiorari to review the significant issue presented and reverse the judgment of the court below.

Dated this 21st day of December, 1992.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the Catawba Nation of South Carolina,

Plaintiff-Appellant,

v.

STATE OF SOUTH CAROLINA, RICHARD RILEY, as Governor of the State of South Carolina; COUNTY OF LANCASTER, and its county council consisting of Francis L. Bell, as Chairman, Fred E. Plyler, Eldridge Emory, Robert L. Mobley, Barry L. Mobley, L. Eugene Hudson, Lindsay Pettus, City of Rock Hill, J. Emmett Jerome, as Mayor, and its City Council consisting of Melford A. Wilson, Elizabeth D. Rhea, Maxine Gill, Winston Searles, A. Douglas Echols, Frank W. Berry, Sr., Bowater North American Corporation of America, Catawba Timber Co., Celanese Corporation of America, Citizens and Southern National Bank of South Carolina, Crescent Land & Timber Corp., Duke Power Company, Flint Realty and Construction Company, Herald Publishing Company, Home Federal Savings and Loan Association, Rock Hill Printing & Finishing Company,

No. 90-2446

Roddey Estates, Inc., Southern Railway Company, Springs Mills, Inc., J.P. Stevens & Company, Tega Cay Associates, Wachovia Bank and Trust Company, Ashe Brick Company, Church Heritage Village & Missionary Fellowship, Nisbet Farms, Inc., C.H. Albright, Ned Albright, J.W. Anderson, Jr., John Marshall Wilkins, II, Jesse G. Anderson, John Wesley Anderson, David Goode Anderson, W.B. Ardrey, Jr., Elizabeth Ardrey Grimball, John W. Ardrey, Ardrey Farms, F.S. Barnes, Jr., W. Watson Barron, Wilson Barron, Archie B. Carroll, Jr., Hugh William Close, James Bradley, Francis Lay Springs, Lillian Crandal Close, Francis Allison Close, Leroy Springs Close, Patricia Close, William Elliot Close, Hugh William Close, Jr., Robert A. Fewell, W.J. Harris, Annie F. Harris, T.W. Hutchinson, Hiram Hutchinson, Jr., J.R. McAlhaney, F.M. Mack, Jr., Arnold F. Marshall, J.E. Marshall, Jr., C.E. Reid, Jr., Will R. Simpson, John S. Simpson, Robert F. Simpson, Thomas Brown Snodgrass, Jr., John M. Spratt, Marshall E. Walker, Hugh M. White, Jr., John M. Belk, Jane Nisbet Goode, R.N. Bencher, W.O. Nisbet, III, Pauline B. Gunter, J.Max Minson, W.A. McCorkle, Mary McCorkle, William O. Nisbet, Eugenia Nisbet White, Mary Nisbet Purvis, E.N. Martin, Robert M. Yoder,

Defendants - Appellees.

Appeal from the United States District Court
for the District of South Carolina, at Rock Hill.
Joseph P. Willson, Senior District Judge.
(CA-80-2050)

Argued: February 4, 1992

Decided: September 22, 1992

Before WIDENER, HALL, MURNAGHAN, SPROUSE, NIEMEYER, and LUTTIG, Circuit Judges, sitting in banc.

Affirmed in part, reversed in part, and vacated and remanded in part by published opinion. Judge Widener wrote the opinion, in which Judges Hall, Murnaghan, Sprouse, Niemeyer, and Luttig joined. Chief Judge Ervin, Judges Russell, Phillips, Wilkinson, Wilkins, and Hamilton, and Senior Judge Butzner did not participate in this decision.

COUNSEL

ARGUED: Jay Bender, BAKER, BARWICK, RAVENEL & BENDER, Columbia, South Carolina, for Appellant. James Linwood Quarles, III, HALE & DORR, Boston, Massachusetts; Michael John Giese, LEATHERWOOD, WALKER, TODD & MANN, P.C., Greenville, South Carolina, for Appellees. **ON BRIEF:** Don B. Miller, NATIVE AMERICAN RIGHTS FUND, Boulder, Colorado; Robert M. Jones, Rock Hill, South Carolina; Richard Steele, Union, South Carolina, for Appellant. James D. St. Clair, William F. Lee, HALE & DORR, Boston, Massachusetts; J. D. Todd, Jr., LEATHERWOOD, WALKER, TODD &

MANN, P.C., Greenville, South Carolina; John C. Christie, Jr., J. William Hayton, David M. Novak, BELL, BOYD & LLOYD, Washington, D.C.; Dan M. Byrd, Jr., Mitchell K. Byrd, BYRD & BYRD, Rock Hill, South Carolina; David A. White, Carolyn W. Rogers, RODDEY, CARPENTER & WHITE, P.A., Rock Hill, South Carolina; T. Travis Medlock, Attorney General, Kenneth P. Woodington, Assistant Attorney General, STATE OF SOUTH CAROLINA, Columbia, South Carolina; Joseph W. Grier, Jr., J. Cameron Furr, Jr., GRIER & GRIER, P.A., Charlotte, North Carolina; W.C. Spencer, Emil W. Wald, SPENCER & SPENCER, P.A., Rock Hill South Carolina, for Appellees.

OPINION

WIDENER, Circuit Judge:

The Catawba Indian Tribe appeals from an order of the district court granting summary judgment in favor of certain defendants as to a number of parcels of real estate on the ground that those defendants had established the adverse possession requirements of South Carolina. We affirm in part reverse in part, and vacate and remand in part.

This litigation began when the Tribe filed a complaint and motion to certify a defendant class on October 28, 1980.[1] In the complaint, the Tribe seeks to be declared the

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[1] The historical facts surrounding the Catawbas' claim to the property in question are set forth at length in this court's first opinion and the Supreme Court's opinion on the matter. See *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S 498

owner of approximately 144,000 acres of land that was set aside for the Tribe's benefit in the 1760 Treaty of Pine Tree Hill and the 1763 Treaty of Augusta and to recover trespass damages for the period of its dispossession. The complaint names seventy-six individuals, companies and public entities as defendants and as representatives of a putative defendant class of more than 27,000 persons with an interest in any portion of the lands in question.

In 1981, the defendants filed a Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim upon which relief can be granted. The motion was based on the effect of the 1959 Catawba Division of Assets Act (Catawba Act), 25 U.S.C. §§ 931-938. The district court treated the motion to dismiss as a Rule 56 motion for summary judgment, granted the defendants' motion and dismissed the case. The court held that the Catawba Act terminated the special relationship that the Tribe had had with the federal government and that the termination of the special federal status of the Tribe made state law apply to it and any claim it might have. Therefore, South Carolina's adverse possession statute began to run against the Tribe's claim on July 1, 1962, the date the Tribe's constitution was revoked pursuant to the Catawba Act. Because South Carolina Code § 15-3-340, the applicable South Carolina statute of limitations, requires actions to recover title or possession to be brought within ten years, the district court held that the Tribe's claims were filed eighteen years after the statute began to run and the claims

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(1986); *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291 (4th Cir. 1983), adopted en banc, 740 F.2d 305 (4th Cir. 1984), rev'd, 476 U.S. 498 (1986).

were barred. The court, while noting that South Carolina does not allow a party to obtain title by adverse possession by "tacking" his period of possession to a predecessor's period of possession (unless the land passes by inheritance), held that South Carolina's non-tacking rule "is not relevant to the defendants' assertion that the plaintiff's claims are barred by the statute of limitations."

First a panel of this court and then the court sitting en banc reversed the district court and held that the state statute of limitations does not apply to the Tribe's claim. *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1300 (4th Cir. 1983), adopted en banc, *Catawba Indian Tribe v. South Carolina*, 740 F.2d 305 (4th Cir. 1984). Because this court held that the state statute of limitations does not apply, we did not reach the question of whether the district court had correctly applied the statute of limitations. The Supreme Court then reversed this court and held that the South Carolina statute of limitations does apply to the Tribe's claim. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510-11 (1986). The Court then remanded the case to this court for consideration of the district court's application of the South Carolina statute of limitations to the Tribe's claim. On remand from the Supreme Court, this court held that the Tribe is entitled to invoke the presumption of possession set forth in S.C. Code § 15-67-220; that the Tribe's acknowledgement that it did not actually possess the land within the ten year period specified in S.C. Code § 15-3-340 is not a bar to its claim; and that South Carolina's disallowance of tacking means that the Tribe's claim is only barred as to those persons who held or whose predecessors held the property for ten years without tacking except by inheritance.

We summarized our portion of the holding pertinent to the present matter as follows:

> [S]ections 15-3-340[2] and 15-67-210[3] [of the South Carolina Code] bar the tribe's claim against each person who holds and possesses property that has been held and possessed adversely for 10 years after July 1, 1962, and before October 20, 1980,[4] without tacking except by inheritance, in accordance with South Carolina's tacking doctrine. The statutes of limitations do not bar

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[2] Section 15-3-330, at the time this action was brought, provided as follows:

> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.
>
> A second action for the recovery of real property shall be brought within two years from the rendition of the verdict or judgment in the first action or from the granting of a nonsuit or discontinuance therein.

[3] Section 15-67-210 provides as follows:

> In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law. The occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action.

[4] The complaint actually was filed on October 28, 1980. Therefore, the defendants had until October 28, rather than October 20, to fulfill the ten year requirement.

> the tribe's claim against other persons. "Persons" includes joint tenants, tenants in common, partnerships, associations, and corporations.

Catawba Indian Tribe v. South Carolina, 865 F.2d 1444, 1456 (4th Cir.), cert. denied, 491 U.S. 906 (1989). Therefore, on remand from this court, the district court was required to determine which claimants met the adverse possession requirements.

Forty-six of the named defendants filed a supplemental brief and affidavits in support of their summary judgment motion. The district court entered summary judgment in a series of orders with respect to certain properties for which summary judgment was sought. The court also dismissed twenty-nine defendants from the case as it determined that summary judgment had been granted as to all property in which they had an interest.

Summary Judgment Standard

Our review of summary judgments is de novo. *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 118 (4th Cir. 1991). Summary judgment is appropriate when there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a summary judgment motion, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, when the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, summary judgment is appropriate. *Matsushita*, 475 U.S. at 587.

The party moving for summary judgment has the burden of establishing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. See 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure: Civil 2d* § 2727 (1983). However, once the moving party has met its burden under Rule 56(c), the adverse party "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). See also *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985)("Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice. A trial, after all, is not an entitlement. It exists to resolve what reasonable minds would recognize as real factual disputes"). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'" and summary judgment is appropriate. *Matsushita*, 475 U.S. at 587.

I.

South Carolina Adverse Possession Law

"[C]laim of title by adverse possession require[s] proof of actual, open, notorious, hostile, continuous and exclusive

possession by [the claimant], or by one or more persons through whom [the claimant] claim[s], for the full statutory period of ten years, without tacking of possession except by descent cast." *Crotwell v. Whitney*, 92 S.E.2d 473, 477 (S.C. 1956); see S.C. Code § 15-3-340; S.C. Code § 15-67-210, "[T]he burden of proof of adverse possession is on the party relying thereon." *Mullis v. Winchester*, 118 S.E.2d 61, 63 (S.C. 1961). In South Carolina, "[o]rdinarily, adverse possession is a question of fact for the jury and it becomes a question of law only when the evidence is undisputed and susceptible of but one inference." *Gardner v. Mozingo*, 358 S.E.2d 390, 392 (S.C. 1987).

II.

Sufficiency of the Allegations in Claimants' Affidavits

The district court made the following rulings with respect to the sufficiency of the affidavits submitted in support of the claimants' motions for summary judgment:

> A defendant whose uncontroverted affidavit states or shows that he (or his predecessor) has continuously occupied or possessed the property for ten years (without tacking except by inheritance), has treated the property as his own, paid taxes thereon, maintained the property and taken steps to protect it against trespassers or others who might seek to use it or assert any claim to it, has demonstrated adverse possession of the property.
>
> A defendant whose uncontroverted affidavit states or shows that he (or his predecessor) continuously occupied or possessed property pursuant to color of title for ten years

(without tacking except by inheritance) has demonstrated adverse possession of the property.

Mortgage documents are writings sufficient to constitute color of title for purposes of establishing adverse possession.

Timber growing or farming is sufficient occupation or possession of the property to establish adverse possession.

A deed to a husband serves as color of title for his wife if their marriage took place while Dower rights still attached to all lands of which a husband was seized during coverture.

The Tribe argues that the requirements set forth by the district court are insufficient because they do not require allegations of specific acts of possession. They argue that any affidavits which fail to set forth specific acts of possession are insufficient as a matter of law to meet the requirements of adverse possession.

We are of opinion that a claimant who produces affidavits or other sufficient documents establishing without contradiction in fact that he or a predecessor held the record title to the property, possessed, occupied, or held the property, paid taxes on the property, and took steps to protect the property from trespassers for the requisite ten-year period without tacking except by descent, has met his burden under Rule 56(c) of establishing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. Therefore, in those cases where the claimant has so met his burden, to avoid summary judgment, the Tribe, by affidavit or as otherwise provided in Rule 56, must set

forth specific facts showing that there is a genuine issue for trial.

"As a general rule, the law presumes that the exclusive possession of land by one who is a stranger to the holder of the legal title is adverse." *Mullis,* 118 S.E.2d at 66. In this court's earlier decision, we determined that if the Tribe held Indian title to the property in question in 1962, then it held the legal title at that time. 865 F.2d 1444, 1451 (4th Cir. 1989). Therefore, applying the rule stated in *Mullis,* any person other than the Tribe who exclusively possessed the property would be a stranger to the holder of the legal title and would be presumed to be holding it adversely.

In addition, when "a person goes into possession of land under a deed from a third person which purports on its face to convey to him an absolute and exclusive title to the entire interest in the land, and such deed is spread upon the public records, this is notice to the world that he is claiming the entire and exclusive interest in the land, and his possession may be adverse to all the world from the time of its commencement." *Sudduth v. Sumeral,* 39 S.E. 534, 539 (S.C. 1901). "The claimant's possession and its continuity will be sufficient if by his acts and conduct it is apparent to men of ordinary prudence that he is asserting and exercising ownership over the property; and for this purpose it is necessary to take into consideration the nature, character, and location of the property and the uses for which it is fitted or to which it has been put." *Smith v. Southern Railway,* 118 S.E.2d 440, 443 (S.C. 1961) (quoting 1 Am.Jur. *Adverse Possession* § 149).

The Tribe has not met its burden in establishing that there is a genuine issue for trial as to many of the claimants.[5] To survive the claimants' motions for summary judgment, the Tribe must establish that there is a genuine issue as to whether the claimants have satisfied South Carolina's adverse possession requirements. Once a claimant met his burden under Rule 56(c), the Tribe was required to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The Tribe argues that an averment of possession in an affidavit is insufficient to establish possession for summary judgment purposes. We disagree. Once a claimant stated in an affidavit sufficient facts to sustain a motion for summary judgment in his favor, the burden shifted to the Tribe to establish that there is a "material issue of fact." Affidavits by a claimant that he possessed the property or held and occupied the property as his own, paid taxes on it, and took steps to protect it from trespassers is sufficient to sustain a motion for summary judgment so long as the ten-year requirement is met and

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[5] The Tribe makes numerous attacks against the affidavits, but in nearly every instance it has not shown a need for a trial. We reject the Tribe's argument that certain affidavits were insufficient because they did not attach certified copies of all the documents referred to in the affidavits. The documents referred to are, in most, if not all, cases, available as public records concerning property. The Tribe has not disputed the veracity of the statements concerning the use of the property and thus have not shown the need for a trial. Also the Tribe does not contest the content of the documents referred to or even state it does not know their content. Thus, it has shown no prejudice for any non-compliance with the rule.

the statements were made on personal knowledge. Therefore, in order to avoid summary judgment when faced with such an affidavit, the Tribe was required, by affidavit or as otherwise provided for in Rule 56, to allege facts showing that there is a dispute as to whether a claimant did those things claimed in the affidavit. Absent such a showing, there is no "material issue of fact" and summary judgment was properly granted to the claimant.

Some of the claimants, by affidavit, identified the nature and use of the property they claimed as timber farming, timber growing, timberlands, or tree farm. The Tribe argues that these descriptions are insufficient to sustain a motion for summary judgment. Again, the Tribe has mistaken the summary judgment standard. The statements by the claimants are sufficient to meet the requirements of adverse possession. See *Mullis*, 118 S.E.2d at 66 (claimant who entered upon the land under color of title and occupied the land for his ordinary use in growing timber upon land and obtaining timber therefrom satisfied adverse possession requirements). Therefore, to avoid having summary judgment granted against them, the Tribe had the burden of disputing, by affidavit or otherwise, that the property was not used for timber farming and that any other acts alleged which would establish possession were not present.

Further, we are of opinion that averments that property was used for recreational or farming purposes are sufficient to establish possession for adverse possession purposes. See *Mullis*, 118 S.E.2d at 65 (acts of adverse possession "are only required to be exercised in such way and in such manner as is consistent with the use to which

the lands may be put and the situation of the property. . . . "). Again, to avoid summary judgment the Tribe was required to controvert facts alleged in the claimants' affidavits.

In sum we find that those averments made in the affidavits are sufficient to satisfy the open, notorious, continuous, and hostile requirements.[6] The only questions remaining are whether the affidavits sufficiently established that they were based on personal knowledge and whether they established that the ten-year period was met.

III.

No Personal Knowledge by Affiants

The Tribe argues that some of the affidavits are not based on personal knowledge and, as a consequence, are insufficient as a basis for summary judgment. Federal Rule of Civil Procedure 56(e) provides as follows:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters therein.

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[6] The Tribe claims that a number of the affidavits contain admissions that the property described was "neither occupied, possessed nor used." We have inspected each of those affidavits and find the Tribe's argument to be without merit. When the pertinent section of each affidavit is read it is apparent that the affiant has alleged sufficient acts to establish entry upon and possession of the property.

To comply with Rule 56(e), there must be a showing that the statements made in the affidavits were made on personal knowledge. "The absence of an affirmative showing of personal knowledge of specific facts vitiates the sufficiency of the affidavits and, accordingly, summary disposition based thereon [is] improper." *Antonio v. Barnes*, 464 F.2d 584, 585 (4th Cir. 1972).

The Tribe asserts that some of the affidavits are insufficient because there has been no showing that the statements contained in them are based on personal knowledge. Some of these statements were made by individuals concerning use of the property by family members. We are of opinion that, in ordinary circumstances, and nothing else appearing, an individual can be presumed to have personal knowledge of the possession of land by a family member. Absent a specific showing by the Tribe that an individual did not have personal knowledge of the use of a tract of land by a family member, the statements concerning familial use of the property comply with Rule 56(e)'s personal knowledge requirement. Therefore, we reject the Tribe's argument that the affidavits were not based on personal knowledge as to those statements concerning use of property by family members of the affiant.

The Tribe also attacks certain affidavits made by corporate officers on behalf of the corporation. We are of opinion that, ordinarily, officers would have personal knowledge of the acts of their corporations. Therefore, since the Tribe did not set forth facts, by affidavit or otherwise, that would show that the officers did not have personal knowledge, the personal knowledge requirement is satisfied as to those affidavits.

Two of the affidavits attacked as insufficient for lack of personal knowledge were made by one Alton G. Brown. In his first affidavit, dated May 22, 1989, Brown does not allege that his statements were made based on personal knowledge. However, this is remedied in his supplemental affidavit wherein he states, "During the entire period from 1962 to 1979, I was familiar with use and possession of the Spencer Property referred to in my affidavit of May 22, 1989." Therefore, the combined affidavits were sufficient.

As to those affidavits set forth at Appendix C, we are of opinion that, while they do set forth sufficient facts to sustain a motion for summary judgment, on their face, they do not establish that the affiant's statements were based on personal knowledge. Therefore, we remand as to the claims based on those affidavits solely for the district court to determine whether the statements were made on the basis of personal knowledge.

While certain affidavits did not establish that they were based on personal knowledge, summary judgment was properly granted as to the property described therein as supplemental affidavits were filed that remedied the problem.

IV.

Tacking

The general rule in South Carolina, contrary to the rule in most jurisdictions, is that "even though there be privity by deed or devise between successive adverse occupants of land, the possession of such occupants cannot be tacked to make out title by adverse possession under the statute of

limitations." D. Means, *Survey of South Carolina Law: Property*, 10 S.C.L.Q. 90 (1957). Tacking has been allowed in South Carolina in cases of intestate succession, but not when the disseisor conveys by deed. See *Epperson v. Stansill*, 42 S.E. 426 (S.C. 1902). In the following passage, the Supreme Court of South Carolina explained its reasoning:

> If possession of land is transmitted by the act of disseisor before the statutory bar is complete, the grantee of the diseisor cannot unite his possession with that of the disseisor in order to show adverse possession for the requisite period. But when the heir is in of his ancestor's possession, and makes no new entry, the possession of ancestor and heir may be united in making out the statutory period; the distinction being that, when possession is case by operation of law from ancestor to heir in possession, there is no break in the continuity of possession, whereas, in the case of disseisor and grantee, there is a new entry and a break in the continuity of possession.

Epperson, 42 S.E. at 427 (citations omitted). Therefore, following that Court's reasoning, we are of opinion that South Carolina courts would allow tacking when a change in possession occurs by operation of law. It follows that when a transfer in possession occurs other than by operation of law, South Carolina courts would not allow tacking.

The district court in granting summary judgment allowed tacking in a number of situations. The Tribe argues that the court erroneously created new exceptions to South Carolina's no-tacking rule and, in other

instances, erroneously applied the no-tacking rule.[7] We take each instance in turn.

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[7] The district court erred in granting summary judgment as to two parcels claimed by a Close family trust. The chain of title of these tracts contained transfers of record within the ten-year statutory period. One of the parcels was transferred from Southern Appliances to the trustees on May 7, 1971 (nine years after the statute began running against the tribe in 1962 and nine years prior to the filing of the suit in 1980) by deed dated May 7, 1971 and recorded May 12, 1971 in deed book 418 at page 382. The other parcel was deeded to the trustees by deed dated March 18, 1974 and recorded March 21, 1974 in deed book 481 at page 65. The grantor thereon had been conveyed the property by deed dated May 2, 1971 and recorded May 12, 1971 in deed book 418 at page 382. Again, the dates of these transfers make it impossible for one party to have held the property for the requisite ten year period. Barring the applicability of an exception to the no-tacking rule (no exception is offered by the claimant), the ten-year requirement was not met.

The tribe claims that the record title of another parcel, deeded to the trustees by deed dated September 20, 1972 and recorded September 16, 1972 in deed book 448 at page 38, shows that no party held the property for the requisite ten-year period. The claimants allege that Ann S. Close, who is not a party to the litigation, is the record owner of this parcel and therefore that parcel was not subject to the summary judgment motion. It appears, however, that summary judgment was granted as to that parcel. See Third Judgment Order, Exhibit Y (Parcel with Curt Seifart as grantor recorded in deed book 448 at page 38). Since summary judgment was not sought for that parcel, it could not have been appropriately granted. Therefore, the district court erred in granting summary judgment as to that parcel.

The Tribe also alleges that the district court granted summary judgment as to other parcels (Tax Map Numbers 710 0000 003, 732 0000 003, 730 0000 009, 731 0000 002, 710 0000 004) for which summary judgment was not sought and as to which there was no evidence in the record. These parcels are listed in an

IV.A.

Corporate Merger

The district court allowed tacking in instances when a corporate merger occurred. There appears to be no South Carolina authority on this precise point. The Tribe relies on the following language from *Epperson*, 42 S.E. at 427, to support its argument that tacking should not be allowed in the merger context: "If possession of land is transmitted by the act of disseisor before the statutory bar is complete, the grantee of the disseisor cannot unite his possession with that of the disseisor in order to show adverse possession for the requisite period." The Tribe asserts that merger documents are similar to a deed and, therefore, break the period of possession, because they involve a voluntary act.

We are of opinion, however, that the same rationale used by the courts in allowing tacking between an ancestor and heir, that "when possession is cast by operation of law from ancestor to heir in possession, there is no break in the continuity of possession, "*Epperson*, 42 S.E. at 427, would allow tacking in the context of a corporate merger. While it is true that merger is a voluntary act, the change in possession of the property occurs by operation of law. See S.C. Code § 33-11-106 ("When a merger takes effect- . . . the title to all real estate and other property owned by

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appendix to a memorandum in support of summary judgment dated July 11, 1990. Summary judgment was granted as to those parcels in the Third Judgment Order filed July 18, 1990. It appears that the Tribe is correct that no affidavits were filed to support a motion for summary judgment as to those parcels. Therefore, with no evidence before it, the district court erred in granting summary judgment as to those parcels.

each corporation party to the merger is vested in the surviving corporation without reversion or impairment. . . ."); S.C. 1962 Code § 12-20.6 (superseded) ("All property, real, personal and mixed . . . and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed."); Official Comment to S.C. Code § 33-11-106 ("A merger is not a conveyance or transfer, and does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer."). Therefore, the district court did not err in allowing tacking in the context of a corporate merger.

IV.B.

Transfers from Parent to Subsidiary

On May 1, 1969, Duke Power Company deeded the perimeter lands surrounding the Lake Wylie hydroelectric project to its wholly-owned subsidiary corporation, Crescent Land and Timber Company. The district court granted Duke Power and Crescent's motion for summary judgment based on a ten year period of possession between July 2, 1964 and July 2, 1974. The court stated that Crescent was "a mere alter ego or instrumentality of Duke" Power and the deed did not interrupt continuous possession by Duke Power for adverse possession purposes. We are of opinion that this holding must be reconsidered in light of this opinion.[8]

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[8] We are of opinion that Duke is not estopped from asserting that Crescent is its *alter ego*. The tribe did not rely on any corporate separateness.

The ten year period was met only if the deed from Duke Power to Crescent had no effect on the running of the statute. The Tribe argues that the running of the statute was interrupted by the 1969 transfer.

In South Carolina, "[t]he mere ownership of the capital stock of one corporation by another does not create an identity of corporate interest between the two companies, *or render the holding company the owner of the property of the other,* or create the relationship of principal and agent, or representative, or alter ego between the two." *Gordon v. Hollywood-Beaufort Package Corp.*, 49 S.E.2d 718, 720 (S.C. 1948) (emphasis added).

Also in South Carolina, however, in an appropriate case and in furtherance of the ends of justice the corporate veil may be pierced. *Dewitt Truck Brokers v. W. Ray Fleming Fruit Company,* 540 F.2d 681 (4th Cir. 1976). *Dewitt,* incidentally, is a recent comprehensive exposition of South Carolina law with respect to the facets of *alter ego* which it discusses. Add to that the principle relied upon by the Tribe, that a piercing of the corporate veil generally will not be permitted for the benefit of the parent corporation or its stockholders, 18 AmJur 2d, *Corporations,* §46, which is in accord with 1 *Fletcher Cyclopedia, Corporations* (1990), p. 615, that a sole shareholder may not choose to ignore the corporate entity when it is convenient. With these principles in mind, it appears that Duke had acquired the perimeter property surrounding Lake Wylie some years prior to 1969 and prior to 1965. In 1965, the Federal Power Commission entered its Order 313 requiring power companies to provide recreational opportunities on properties surrounding their reservoirs. In 1969, Duke conveyed the perimeter lands surrounding

Lake Wylie to its subsidiary, Crescent. Standing alone, this might seem to be a conveyance which would prevent tacking on the part of Duke. So far as its title to the perimeter land is concerned, an affidavit of an officer of Crescent, however, states facts which tend to show that Crescent may be the alter ego of Duke. On the other hand, the conveyance of the perimeter lands to Crescent may tend to show that Duke treated Crescent as a separate corporate entity and not as its alter ego, if, as the Tribe claims, the purpose of the conveyance was to avoid setting up recreational facilities as required by FPC Order 313. The district court found that Duke had not violated Order 313. It gave no reasons, but the affidavit of Crescent's attorney may tend to support that conclusion. Whether or not FPC Order 313 was violated, however,is not the end of the question. If the conveyance from Duke to Crescent enabled Duke to avoid compliance with Order 313, even though such avoidance may have been quite legitimate, that would be evidence which tends to show that Duke treated Crescent as a separate corporation and not as its alter ego. The district court also did not consider whether or not the rule we have cited from *Fletcher,* that a sole shareholder may not choose to ignore the corporate entity when it is convenient, has been violated.

In view of the facts we have stated and the authorities, we are of opinion that the district court erred in granting summary judgment to Duke and Crescent with respect to the perimeter property. Its judgment in that

respect is vacated and the case remanded for such further *fact finding as may be appropriate.*[9]

IV.C.

Transfer between Subsidiary Corporations of Same Parent Corporation

The same rules apply in this situation as apply to a transfer between a parent and subsidiary. If the transfer is found as a matter of fact and law to be to an alter ego, the tacking requirement will be complied with, otherwise it will not. The holding of the district court that the ten year period ran as to property claimed by Bowater, Inc., because the transfer between its subsidiaries East Highlands Company and Catawba Timber Company had the effect of stopping the running of the statute prior to the running of the ten-year period must be vacated and that transfer re-examined under the principles stated above in this opinion.

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[9] The Tribe asserts that the district court erroneously held the six year statute of limitations on actions for inverse condemnation applicable to Duke and Crescent's claim to the Lake Wylie Perimeter Property. We do not agree that the district court so ruled. In its amendment to the second judgment order the district court plainly held that the six-year statute applied to the Lake Wylie Dam Property and the Lake Wylie Basin Property. The order made no mention that the statute would apply to the Lake Wylie Perimeter Property and we do not read it as so holding.

IV.D.

Devise to Heirs

The district court held that "[a] devise to an heir of a testator does not interrupt possession." This ruling may be valid in some instances, but invalid in others, as the doctrine of worthier title may apply.

Under the doctrine of worthier title, a devise to the heirs of the testator was a nullity if the interest limited in their favor was identical to that which such heirs would have taken by descent if there had been no devise to them. The rule originated because the feudal incidents of relief, wardship, and marriage were preserved only if the new tenant of land acquired an interest by descent from the former tenant. *See Restatement (Second) of Property* § 30.2, Comment on Subsection (2). Because the reason for the rule, the preservation of feudal incidents, no longer exists, the doctrine as it applies to testamentary dispositions has been abolished by statute in several States, but not in South Carolina. *See Restatement (Second) of Property* § 30.2, Statutory Note.

South Carolina applied the doctrine of worthier title in the case of *Seabrook v. Seabrook*, 10 S.C. Eq. 495 (1859). The rule was there stated as follows, p. 503-504:

> "It is undoubted law, that where a testator gives by his will the same estate to the same persons who would be entitled to take that estate by operation of law in case of an intestacy, the devise or legacy will be void, and the right of the party or parties entitled will be referred to the law of distributions and descents. If there be any variation between the disposition which the will, and which the law makes in such a case,

> either in regard to the persons who are to take, or to the quantity of the estate, the title will be referred to the will."

The court held that the devise to the heirs was void and as to the heir in question the testator died intestate.

Without attempting to go into all of the South Carolina cases touching the subject, we come to the case of *Burnett v. Crawford*, 27 S.E. 645 (S.C. 1897) which is relied upon by the Tribe. That was a case in which an heir had sued the children of another heir for partition. The plaintiff heir had taken her estate by intestacy and the defendant children of the other heir had taken their interest by devise. The testator had entered into a purported settlement of rights in the property with the plaintiff heir some 9 years prior to the testator's death. During that 9 year period, the court considered, at least for the purposes of its opinion, that the testator held adversely to the plaintiff heir. Although the plaintiff brought suit 11 years after the settlement, the court refused to permit tacking of the 9 year period and the two year period although the devise was to the defendants. The Court stated at p. 647:

> "A devisee under a will does not take possession of the devise as heir, but rather as the grantee or purchaser of the testator."

It is that language the Tribe relies upon. But we note that almost immediately following that language, and indeed in the same paragraph, the following statement at p. 647-648:

> "Under a properly framed request, appellant would have been entitled to have the jury instructed as to the right of a devisee claiming under a will to unite his possession with that of

> his testator so as to make out the statutory period of adverse possession."

While the first statement just quoted may seem to have abolished the doctrine of worthier title (as it applies to possession) by implication, the second statement just as surely provides the doctrine to have survived. We are of opinion that both statements may be reconciled by referring back to page 504 of *Seabrook*, which states that if there be any variation between the disposition made by the will and the law, either in regard to the persons who are to take or the quantity of the estate, the title will be referred to the will. While it is true that the testator in *Burnett* did devise the land in question to his children, the defendants, the terms of the will are not stated and we must suppose, in order to justify the correctness of the opinion and make it consistent with the other South Carolina cases, that the will involved, while it may have devised the land to the same heirs, did not give to them the same quantity of estate they would have received by virtue of intestacy or that the record does not show the quantity of estate. We are reassured in our view of *Burnett* by the subsequent case of *Kilgore v. Kirkland*, 48 S.E. 44 (S.C. 1904). In *Kilgore*, the testator had received the property in question, apparently by deed, some 4 or 5 years before his death in 1850, at which time he devised the same to his children, share and share alike. The heirs continued in the testator's possession until the year 1858. On these facts, the South Carolina Court stated:

> " . . . while it is also true to that possession of a devisee cannot be united with that of the testator, to make out adverse possession for the statutory period (*Burnett v. Crawford*, 50 S.C. 161, 27

> S.E. 645), nevertheless, when the heir is in of his ancestor's possession and makes no new entry, the possession of ancestor and heir may be united in making out the period necessary to quiet title."

48 S.E. at 46.

Thus our construction of *Burnett* follows *Kilgore's* construction of *Burnett*, and we think the doctrine of worthier title is extant in South Carolina. We note that Professor Means agrees with our conclusion that tacking should be permitted under the doctrine of worthier title in such cases, although he arrives at his construction of *Burnett* by his view that the problem was not properly presented to the South Carolina Court. Survey of South Carolina Law, 10 S.C.L.Q. 90, n.4 (1957). We are further of opinion that *Seabrook* should not be held by us to have been overruled by implication. Overruling by implication is not favored. See *Rodriquez de Quijar v. Shearson/American Express*, 490 U.S. 477, 484, (1989); *United States v. Bryan*, 339 U.S. 323, 343 at 345-346 (1950) (Justice Jackson concurring). And in diversity cases also that is the rule in this circuit. See *Walk v. Baltimore & Ohio Railroad*, 847 F.2d 1100, 1108 (4th Cir. 1988).

Thus, this aspect of the case must be remanded with instructions to apply the doctrine of worthier title if the claimant heir took as devisee and with the same quantity of estate he would have taken if an heir. If all those requirements are met tacking should be permitted in such cases.

IV.E.

Change in the Identity of a Trustee

The Tribe argues that the district court erred in holding that a change in the identity of a trustee does not interrupt the running of the ten-year statute. We are of opinion the district court correctly held that the appointment of a successor trustee upon the death of the former trustee does not interrupt the running of the statute of limitations. It is a fundamental rule of trust law that a trust will not fail for want of a trustee. *Leaphart v. Harmon*, 195 S.E. 628, 629 (S.C. 1938). Therefore, we hold that, by operation of law, possession is cast from the former trustee to his successor.

IV.F.

Change in Beneficiary of Trust

The Tribe argues that the transfer of a beneficial interest in a trust interrupts the ten-year period. We find no merit to this contention. The property is held adversely by the trust through the trustee. A change in the beneficial ownership has no effect on the running of the statute as there is no new entry onto the property.

V.

William O. Nisbet Property (602.5 and 53 acre tracts)

The Tribe also asserts that a question of fact exists as to the exclusivity and continuity of the possession of William O. Nisbet. Its claim is based on the fact that members of the Catawba Tribe have at times entered the

602.5 and 53 acre tracts owned by Nisbet for the purpose of collecting clay. Mesdames Wade and Campbell submitted affidavits stating that they were never denied access to the property to dig in the clay holes. Nisbet does not dispute that this activity has taken place. However, Nisbet's affidavit shows that he allowed members of the Tribe on to Nisbet's property for access to the clay. He claimed the property as his own and nothing done by the Tribe members amounted to an ouster of Nisbet's possession. Therefore, Nisbet's possession was exclusive and continuous. We agree with the district court's holding that "[a]dverse possession is not interrupted by entry of the owner unless there is also ouster of the claimant." "Actual possession, once taken, will continue, though the party taking such possession should not continue to rest with his foot upon the soil, **until he be disseised,** or until he do some act which amounts to a voluntary abandonment of the possession." *Smith v. Southern Railway,* 118 S.E.2d 440, 442 (S.C. 1961).

It is true that the affidavits of Mesdames Wade and Campbell state that members of the Tribe had gone on the property for years, and the Wade affidavit states that such members of the Tribe did not ask permission or notify the Nisbets of their entry. We leave aside for the moment the fact that the Wade affidavit probably shows on its face it is not on personal knowledge as respects other members of the Tribe, but we do not leave aside the fact that it does not show that Nisbet had any knowledge of such entry. Even if the Wade affidavit is construed most favorably to the Tribe, it does not show any ouster of Nisbet under *Smith,* especially because it does not

show that Nisbet knew of any unauthorized entry onto his property.

The Tribe's point is without merit.

VI.

Adverse Possession & Co-Tenancies

The Tribe takes issue with the district court's ruling that "[t]he adverse possession of one co-tenant establishes the adverse possession of his co-tenants." We find no error.

In South Carolina, it is presumed that "the possession of one tenant in common is the possession of all." See *Woods v. Bivens*, 354 S.E.2d 909, 911 (S.C. 1987). The operation of the rule that the possession of one co-tenant is the possession of all only ceases if "such possession becomes adverse to the co-owners of the possessor." 354 S.E.2d at 911. Therefore, a co-tenant who satisfies the adverse possession requirements does so for all of the co-tenants so long as he does not claim to be holding adversely to his co-tenants. In *Terwilliger v. Marion*, 72 S.E.2d 165, 167 (S.C. 1952), the Supreme Court of South Carolina recognized that a co-tenant can establish adverse possession for both herself and her co-tenant. That being so, we are of opinion that a change in identity of co-tenants has no effect on establishing adverse possession so long as one co-tenant possesses the property for the requisite period. Therefore, we find no merit to the Tribe's contention that the transfer of title as to one co-tenant

interrupted the running of the adverse possession statute.[10]

VII.

Effect of Non-Residency of Claimants

The district court ruled that "[t]he non-residence of a defendant claiming adverse possession does not toll the statutory period." The Tribe argues that the ten year adverse possession period was tolled against certain defendants because they may have been outside of South Carolina for more than one year. S.C. Code § 15-3-30 provides that if a defendant is out of state for more than one year when or after a cause of action accrues, the statute of limitations is tolled until his return to the state. See *Dandy v. American Laundry Machinery Inc.*, 389 S.E.2d 866, 868 (S.C. 1990).

We are of opinion that this tolling statute is not applicable to adverse possession claims. "[T]he purpose of the tolling statute is to remedy the problem of locating

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[10] As an additional argument, the Tribe claims that a transfer by deed from a disseisor's executors to a devisee interrupts the running of the adverse possession statute and therefore certain percentage interests in property claimed by the Nisbet family were not held for the requisite period. Also the Tribe argues that the creation or termination of a trust interrupts the 10 year period. We do not reach these issues as our holding that one co-tenant can establish adverse possession for all co-tenants allows the Nisbets and other claimants to establish adverse possession as to their entire holding by establishing that one co-tenant held the property for the requisite period. For example, it appears that the Nisbet trust held an undivided interest for the entire requisite 10 year period.

a nonresident defendant before expiration of the statue of limitations." 389 F.2d at 868. Recently, the Supreme Court of South Carolina has indicated that the tolling statute is inapplicable when the statute's purpose is not fulfilled. See *Dandy*, 389 S.E.2d at 868 (§ 15-3-30 does not apply to a foreign corporation with a registered agent in South Carolina because there is no problem in locating the nonresident defendant before expiration of the statute of limitations). In so doing, the court appears to have rejected the reasoning used in two prior cases that relied on the plain language of the statute. See *Cutino v. Ramsey*, 328 S.E.2d 72 (S.C. 1985) (tolling statute applies to an out-of-state defendant even when service can be effected by substitute service on the Chief Highway Commissioner); *Harris v. Dunlap*, 328 S.E.2d 908 (S.C. 1985) (amenability to personal service under the long-arm statute does not render the tolling statute inapplicable). The *Dandy* case makes clear that the current test in South Carolina for determining the applicability of the tolling statute is whether the problem of locating an out-of-state defendant prior to the running of the statute of limitations is present. In the instant case, South Carolina's separate comprehensive statutory scheme for the recovery of real property obviates the need for a tolling statute against out-of-state defendants in adverse possession cases. See S.C. Code, Title 15 – *Civil Remedies and Procedures*, Chapter 67 – *Recovery of Real Property*. Specifically, S.C. Code § 15-67-30 authorizes summons and service by publication on parties outside of the State in actions "to determine adverse claims." Therefore, the problem that the tolling statute addresses, the difficulty in locating an out-

of-state defendant before expiration of the statute of limitations, is not present as there is no need to locate the out-of-state defendant in an adverse possession case. In sum, we follow South Carolina's rule, as stated in *Dandy*, that the tolling statute is inapplicable in cases in which the problem that the statute was meant to address is not present and hold the tolling statute for out-of-state defendants to be inapplicable to adverse possession claims.

VIII.

Dismissal of Certain Claimants

The Tribe alleges that the district court erroneously dismissed certain parties from the case. The district court dismissed twenty-nine claimants, holding that answers to interrogatories on file established that those claimants were entitled to have all parcels claimed by them dismissed from the action. The Tribe argues that, in fact, no answers to interrogatories were filed with the district court. The claimants argue that the information contained in the interrogatory answers was presented to the district court in summary form in briefs, memoranda, and appendices and the Tribe did not object to the use of this information in this form. We are of opinion the district court did not err in relying on these summaries in its dismissal orders as the Tribe did not dispute their accuracy.

We are of opinion, however, that as to those parties that moved for summary judgment as to certain parcels that were not released by the summary judgment orders,

the district court erred in dismissing them from the action. Those parties are listed in Appendix H.[11]

Based on the foregoing, the judgment of the district court is

AFFIRMED IN PART, REVERSED IN PART, AND VACATED AND REMANDED IN PART.

APPENDICES A THROUGH H

Without necessarily implying any criticism of the attorneys for the Tribe or for the defendants, a glance at the style of this case and a reference to our various opinions herein shows the more than complicated position in which the parties and the court find ourselves. Many of the defendants own multiple tracts of land and the decision of the district court appealed from is contained in large part in four judgment orders accompanied by multiple exhibits.

Perhaps because the Tribe was confined, at least in part, by rules as to numbers of pages, the content of its brief on appeal generally stated its complaints in the most general terms as to parties and tracts affected, while the brief itself may have specifically stated the nature of the legal error claimed.

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[11] The Tribe argues that John S. Simpson moved for summary judgment as to certain parcels that were not released by the judgment orders. A review of the record indicates that summary judgment was, in fact, granted as to all parcels claimed by John S. Simpson. The Tribe's confusion stems from an apparent typographical error – Tax Map Number 600-11-02-005 became Tax Map Number 600-11-02-035 in the judgment order.

The reply brief of the defendants in many cases picked up and argued the specific legal issues presented leaving their general application as to parties and parcels of land to an interpretation of the district court's orders and the briefs. While we think with reasonable certainty that the attorneys quite understand the parties and the property affected by the briefs, only a casual inspection will reveal that in most cases such is not shown by a reading of the briefs without minute references to the appendix and in some cases to parts of the record not included in the appendix.

For example, on page 41 of the Tribe's brief, in part B, 2, c. "Tree Farms" the objection is "A number of claims identified the nature and use of the property claimed by them as tree farm, timber farming, timber growing or timber lands." The brief then lists 18 appendix references without giving names of defendants or properties affected. To this, the defendants respond on page 21 of their brief by identifying the property of only two defendants with particularity. Much the same can said of Tribe's contentions on page 43, part d. with reference to "Farming or Recreational or Social Purpose." While the defendants' response on page 28 is in more detail than the response mentioned for tree farming, nevertheless, it does not identify all of the property as to which the Tribe's claim is made. We could go on and on, some better and some worse, but these two examples are enough to show why the mechanical construction of our opinion, for the most part, speaks in general terms, and shows its application in most cases by way of appendices. That was the only practical means we could devise within any kind of reasonable page limitation to show what we had decided and how our decision applied to a particular defendant or piece of property. We must all remember that this

opinion concerns the title to real estate and well may end up being recorded in the real estate records of the State.

We should say without rancor that the briefs we have had in this case do not commend themselves as models of form. We have, however, addressed each question of law raised by the Tribe.

For these reasons, we have included as a part of this opinion and the decision in this case appendices A through H, which will show the parties affected, precisely where to find the properties affected, and the parts of our decision affecting the same, including our disposition of the questions.

Appendix A

The defendants' unopposed motion for summary affirmance is hereby GRANTED, and the judgment of the district court is hereby AFFIRMED as to the following parcels of land.

Defendant	*Portion of Judgment Order Describing Parcel*[1]

[1] The volume and complexity of the records describing the parcels of land in this case has prompted us to develop a system of notation whereby the reader may discern what action we have taken with respect to each individual parcel as to which summary judgment was granted. We have attempted to devise a system that strikes a useful balance between simplicity and precision.

The district court's holdings in this case are collected in the form of five judgment orders. We refer to these judgment orders by the words "One," representing the first judgment order beginning at J.A. 848: "Two," representing the second judgment

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order beginning at J.A. 948; "Three," representing the third judgment order beginning at J.A. 960; "Amend.," representing the amended second judgment order beginning at J.A. 1012; and "Four," representing the fourth judgment order beginning at J.A. 1019. The first word in a reference under this column, then, refers the reader to the appropriate judgment order containing the parcel at issue.

Each judgment order is accompanied by exhibits which describe with particularity each parcel at issue and naming the defendant who claims that parcel. We reference these exhibits by using the same capital letters, beginning with A and proceeding alphabetically, as does each judgment order. The second letter in a reference in this column is the capital letter designating the exhibit in which the reference occurs.

The next number or entry in a reference represents the specific tract of land contained in a particular exhibit. Regrettably, the exhibits employed by the district court do not use a uniform notation to refer to a particular parcel of land. Accordingly, the last number or numbers in a reference represent our best judgment as to the most clear and concise way to identify a specific parcel. Where possible we have employed tax map numbers. Less often we have referred to numbered paragraphs in the exhibit. Only where necessary have we resorted to a more lengthy description of a parcel, such as by deed book and page number, dates and grantors, and the like.

The final number in a reference, in parentheses, is the Joint Appendix number where that reference may be found.
As an example, the reference

One,C, (857)
¶1
¶2
¶3
¶4

refers to the parcels found in paragraphs one through four of exhibit C to the first judgment order, appearing at J.A. p. 857.

1.	Hoechst Celanese	One, A, (856); Deed dated 10/1/86; Deed Book 922, page 195, York County; except property described on page 2, paragraph 9 of the deed: Deed from Celriver Recreation Assoc. To Celanese Corp. dated 6/2/78 recorded in York County Clerk's Office, Deed Book 572, page 377, on 6/5/78 and property described on page 2, paragraph 10 of the deed: Deed from David Int'l, Inc., to Celanese Corp. dated 6/11/85 recorded in York County Clerk's Office, Deed Book 825, page 160 on 6/26/85.
2.	Wachovia Bank and Trust Company	One, B, ¶(i), (855); Deed dated 10/30/50, Deed book 164, page 320 York County, SC
3.	Heritage Village	One, C, ¶4, (857); Deed dated 8/1/85, Deed Book F-6, page 2544 One, C, ¶10, (858-59); Deed dated 11/30/81; Deed Book 648, page 311 and Deed dated 1/27/84; Deed Book 741, page 332; One, C, ¶11, (859); Deed dated 9/30/82; Deed Book 678, page 230; One, C, ¶13, (859); Deed dated 5/2/85, Deed Book 816, page 105

4.	T.W. Hutchison	One, J, (866); TMS No. 664-00-00-020; Deed dated 6/20/63; Deed Book 313, page 383
5.	Francis M. Mack, Jr.	One, K, (867); Deed dated 11/23/76, Deed Book 540, page 16; Deed dated 11/15/50, Deed Book 165, page 491; and Deed dated 1/24/85, Deed Book 804, page 157
6.	John S. Simpson	One, L, (868); Deed dated 11/2/50; Deed Book 165, page 23
7.	Thomas Brown Snodgrass, Jr.	One, M, (869); File No. 14644 Probate Court York County and File No. 15772; Probate Court York County
8.	City of Rock Hill South Carolina	One, O, (871); Deed dated 9/5/86; Deed Book 906, page 293

Appendix B

The judgment of the district court is hereby AFFIRMED as to the following parcels of land.

Defendant	*Portion of Judgment Order Describing Parcel*	*Section of this Opinion Addressing Objections*[2]
1. Wachovia Bank and Trust Company	One, B, ¶(ii),(855) Deed dated 10/30/1950 Deed Book 164, page 320 Three, A, (968) ¶1.a-Deed dated 6/20/57 Deed Book 240, page 182 ¶1.b.-Deed dated 6/21/57 Deed Book 240, page 179 ¶1.c.-Deed dated 12/12/63 Deed Book I, page 203	VI (All tracts*)

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[2] The references to the designated sections of the foregoing opinion are largely self-explanatory. As for the references to section II of our opinion, which deals with several issues relating to the sufficiency of the allegations in the defendants' affidavits, we have devised a shorthand notation for purposes of identifying which specific aspect of section II addresses the relevant objection of the Tribe.

Notation	*Title of Corresponding Section of Tribe's Opening Brief*
II (concl.)	"Conclusory Averments of Possession"
II (sp. pc.)	"Possession of Specific Parcels Not Shown"
II (tree)	"Tree Farms"
II (farm)	"Farming and Recreational or Social Purposes"
II (poss.)	"No Actual Possession or Entry"
II (dates)	"Dates of Use"
II (cont.)	"Continuity of Possession"

¶2.a.-Deed dated 4/20/66 II(poss.)
¶3-275 acres, York County VII
¶4-680 acres, York County VII

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* An objection was raised as to all tracts in the judgment order and summary judgment is affirmed as to all tracts unless they are specifically mentioned in Appendices C-H.

2. Heritage Village One, C, (857)

Date of Conveyance	*Book*	*Page*	
?	250	522	VII
12/1/83	733	95	n.5
(Glover)	812	356	n.5
7/5/84	772	356	III
			n.5
11/15/78	585	18	III
8/10/84	773	39	III
6/15/84	771	188	n.5
9/16/75	528	226	III
4/29/81	631	555	n.5
1/15/85	803	202	III
			n.5
4/25/78	569	939	III

Three, B, (969)

Date of Conveyance	*Book*	*Page*	
2/15/85	804	99	III
			n.5
12/12/77	C-6	5365	II (poss.)
2/84	756	83	III
			VII
1/6/78	562	914	II (dates)
1/78	C-6	5482	III
1/78	C-6	5483	VII

	8/31/83	718	318	II (cont.) III
3.	Herald Publishing Company	One, D, (860) Tract C-Deed dated 5/12/77; Deed Book 548, page 49 Tracts A, B & F-Deed dated 6/26/86; Deed Book 896, page 286 Tract E-Deed dated 5/20/81; Deed Book 631, page 957 Tract D-Deed dated 6/26/86; Deed Book 896, page 286 Three, C, (970) Tracts L & K-Deed dated 10/31/85; Deed Book 849, page 500		II (poss.) III
4.	C.H. Albright	Three, D, (971-972)		III, n.5 (All tracts below)
		Tax Map Numbers		
		600-02-03-061		II (dates) II (cont.)
		600-02-02-064		II (dates) II (cont.)
		598-19-03-016		II (dates) II (cont.)
		598-19-03-015		II (cont.)
		627-07-04-025		II (dates) II (cont.)
		600-20-01-010		II (dates) II (cont.)
		600-21-03-036		II (dates) II (cont.)

600-21-01-018	II (dates) II (cont.)
600-21-02-011	II (dates) II (cont.)
600-21-02-010	II (dates) II (cont.)
627-02-02-006	II (dates) II (cont.)
620-00-00-005	II (tree fm.) II (dates)
620-00-00-007	II (tree fm.) II (dates)
620-00-00-008	II (tree fm.) II (dates)
627-22-02-021	II (poss.) VI

5. Ned M. Albright One, F, (862)

Date of Conveyance	*Book*	*Page*
2/13/56	221	447
2/17/78	565	930
3/21/80	611	528
5/17/79	594	256

Three, E,
(973) III, n.5 (All tracts below)

Tax Map Numbers

629-06-02-015	II (dates) II (cont.)
627-22-02-021	

6. David G. Anderson — One, G, (863)

Date of Conveyance	*Book*	*Page*	
8/24/85	838	208	
7/8/85	827	350	IV-E
			VI
			VII

7. John Wesley Anderson, III — One, H, (864)

Date of Conveyance	*Book*	*Page*	
7/8/85	827	350	IV-E
			VI
8/24/85	838	208	

Three, I, (977) n.10
Tax Map III
604-06-01-028 II (dates)

8. F.S. Barnes, Jr. — One, I, (865)
Deed dated 1/28/57 III
Deed Book 235, page 415
Three, J, (978) III (All tracts below)
536-00-00-038 II (farm)
II (dates)
597-00-00-019 II (tree)
II (dates)
639-00-00-022 II (poss.)
II (dates)
639-00-00-025 II (farm)
II (dates)

	639-00-00-030	II (farm) II (dates)
	639-00-00-031	II (farm) II (dates)
	639-00-00-032	II (farm) II (dates)
	627-10-02-029	II (dates)
	627-12-01-001	II (dates)

9. Marshall E. Walker — One, N, (870)

Date of Conveyance	*Book*	*Page*
3/6/69	387	393
10/12/56	202	307
9/26/69	383	307

	Three, P, (985-986)	III, n.5 (All tracts*)
	624-00-00-016	II (tree) II (dates)
	624-00-00-011	II (tree) II (dates)
	677-00-00-026	II (tree) II (dates)
	624-00-00-012	II (tree) II (dates)
	621-00-00-042	II (tree) II (dates)
	622-00-00-014	II (tree) II (dates)

	674-00-00-003	II (tree)
		II (dates)
	675-00-00-064	II (tree)
		II (dates)
	675-00-00-065	II (tree)
		II (dates)
	752-00-00-031	II (tree)
		II (dates)
	675-00-00-062	II (tree)
		II (dates)
	624-00-00-014	II (tree)
		II (dates)
	678-00-00-017	II (tree)
		II (dates)
	678-00-00-011	II (poss.)
		II (dates)
	622-00-00-007	II (dates)
	622-00-00-013	II (dates)
	624-00-00-015	II (dates)
	692-00-00-046	II (dates)
	598-05-02-010	II (dates)
	677-00-00-019	II (dates)
	674-00-00-006	
	624-00-00-010	
10. Duke Power Company	One, P, (872-900)	III, n.5 (All tracts*)

Date of Deed	*Recordation Date*	*Book/Page*
York County, South Carolina		
5/11/00	6/13/00	19/621-633
09/01/25	12/05/25	65/48
09/01/25	12/05/25	65/53
12/19/27	12/21/27	65/303
05/10/32	06/01/32	74/540
06/27/36	08/05/36	87/138
09/08/24	09/17/24	61/283
06/05/24	06/07/24	61/68
03/19/26	04/09/26	2-P/19 (Plat Book)
05/21/30	05/28/30	74/231
05/18/25	12/24/25	65/61
09/03/24	09/17/24	54/623
09/24/24	10/01/24	54/623
09/08/24	09/17/24	54/617
09/23/24	10/01/24	54/622
09/01/25	02/05/25	65/53
06/27/36	08/05/36	87/138
12/24/03	01/23/05	24/637-38
12/30/03	01/23/05	24/636-37
12/23/03	01/23/05	24/635-36
12/26/03	01/23/05	24/634
01/02/04	01/23/05	24/632-33
12/23/03	01/23/05	24/631-32
01/26/04	01/23/05	24-630-31
01/28/04	01/23/05	24/628-29
04/12/04	01/23/05	24/627-28
01/16/04	01/23/05	24/621-22
12/23/03	01/23/05	24/625-26
12/21/03	01/23/05	24/622-23
12/21/03	01/23/05	24/626-27
12/21/03	01/23/05	24/620-21
03/11/04	01/23/05	24/624-25
03/31/04	01/23/05	24/623-24
01/27/04	01/23/05	24/638-39

02/25/05	05/16/05	25/56-57
04/01/04	06/03/05	25/86
07/27/05	07/31/05	25/142
01/30/09	02/01/09	29/455-56
04/11/14	06/06/14	39/614
04/15/16	06/06/14	39/613
03/16/16	03/28/16	44/137
03/16/16	03/28/16	44/138
03/17/16	03/28/16	44/138
03/20/16	03/28/16	44/139
03/17/16	03/28/16	44/139
03/17/16	03/25/16	44/140
03/17/16	03/28/16	44/140
03/17/16	03/28/16	44/141
03/17/16	03/25/16	44/141
03/16/16	03/28/16	44/142
03/16/16	03/28/16	44/142
03/17/16	03/28/16	44/143
03/28/16	04/04/16	44/144
03/29/16	04/04/16	44/144
03/29/16	04/04/16	44/145
03/22/16	04/12/16	44/152
03/29/16	07/28/16	44/166
01/06/04	01/23/05	24/641-42
01/14/04	01/23/05	24/642-43
01/06/04	01/23/05	24/646-47
01/19/04	01/23/05	24/645-46
03/01/04	01/23/05	24/643-44
01/19/04	01/23/05	24/644-45
01/19/04	01/23/05	24/647-48
01/11/04	01/23/05	24/649
07/19/16	07/22/26	44/165
08/08/16	08/14/16	44/172
09/15/25	01/01/25	65/14
09/03/30	10/18/30	74/277
03/30/34	04/03/34	79/184
09/20/38	09/21/38	92/599

03/01/40	03/12/40	98/252
09/26/50	10/12/50	163/384
04/22/53	04/30/53	193/75
03/08/04	01/23/05	24/664
03/08/04	01/23/05	24/665-66
03/07/04	01/23/05	24/659-60
03/25/04	01/23/05	24/663-64
03/08/04	01/23/05	24/660-61
03/08/04	01/23/05	24/662-63
07/19/04	01/23/05	24/639-40
03/10/04	01/23/05	24/650-51
03/11/04	01/23/05	24/650-51
03/11/04	01/23/05	24/658-59
03/07/04	01/23/05	24/651-52
03/10/04	01/23/05	24/653-54
03/08/04	01/23/05	24/654-55
03/15/04	01/23/05	24/652-53
03/11/04	01/23/05	24/656-57
03/07/04	01/23/05	24/655-56
03/07/04	01/23/05	24/657-58
09/01/05	08/24/06	26/370
07/02/07	07/13/07	27/577
03/20/07	09/13/07	27/671
03/20/07	09/13/07	27/673
03/20/07	09/13/07	27/672
05/24/17	06/04/17	44/315
05/22/17	06/05/17	44/313
05/27/17	06/05/17	44/312
05/22/17	06/05/17	44/313
05/24/17	06/05/17	44/313
05/24/17	06/13/17	44/318
06/08/17	06/13/17	44/318
06/14/17	06/19/17	44/320-21
05/26/17	06/05/17	44/315
06/15/17	06/15/17	44/318-19
06/15/17	06/15/17	44/319
06/25/17	07/12/17	44/324-25

01/04/05	01/23/05	24/640-41
01/05/05	05/16/05	25/58
01/18/05	05/16/05	25/59
03/15/06	05/01/06	25/767
09/19/05	05/01/06	25/771-772
06/08/05	05/01/06	26/768-769
03/15/06	05/01/06	25/779-780
06/13/05	05/01/06	25/770-771
09/19/05	05/01/06	25/772-773
09/24/05	05/01/06	25/769-770
02/13/06	05/01/06	25/768
03/15/06	05/01/06	25/773-774
06/05/05	06/28/06	26/186
09/01/05	08/24/06	26/370
06/13/07	06/17/07	27/546-547
09/02/07	10/25/07	27/710-711
06/14/05	05/01/06	25/776-77
10/20/05	05/01/06	25/774-75
10/21/05	05/01/06	25/775-76
09/01/05	08/24/06	26/359
09/01/05	08/24/06	26/369
08/02/05	08/24/06	36/372
09/08/05	08/24/06	26/376
08/21/05	08/24/06	26/375
03/29/06	08/02/06	26/251
07/30/06	08/02/06	26/253
07/05/06	08/02/06	26/255
03/31/06	08/02/06	26/254
06/19/06	08/02/06	26/256
04/06/06	08/02/06	26/257
05/07/06	08/02/06	26/259
05/07/06	08/02/06	26/260
03/29/06	08/02/06	26/258
07/05/06	08/02/06	26/262
04/04/06	08/02/06	26/261
03/28/06	28/02/26 [sic]	36/263
03/28/06	08/02/26	26/264

03/28/06	08/02/06	26/265
07/05/06	08/02/06	26/267
07/05/06	08/02/06	26/268
03/29/06	08/02/06	26/266
05/08/06	08/02/06	26/269
07/05/06	08/02/06	26/270
05/07/06	08/02/06	26/272
03/31/06	08/02/06	26/275
04/04/06	08/02/06	26/276
04/03/06	08/02/06	26/278
03/29/06	08/02/06	26/278
06/19/06	08/02/06	26/280
01/25/07	01/28/07	27/135-36
07/04/06	01/28/07	27/133/35
08/30/06	01/28/07	27/148-149
09/05/06	01/28/07	27/149-50
08/16/06	01/28/07	27/141-42
08/16/06	01/28/07	27/131-32
08/30/06	01/28/07	27/127-128
01/25/07	01/28/07	27/132
12/21/06	01/28/07	27/153
11/12/06	06/17/07	27/545-46
01/17/07	06/17/07	27/555-556
09/07/06	06/19/07	27/562
05/29/07	08/28/07	27/636
03/27/06	11/15/07	27/771-72
01/15/09	01/26/09	29/446
01/26/09	02/01/09	29/456-459
02/11/09	02/22/09	29/484
04/05/09	04/29/09	29/530
04/16/09	05/05/09	29/535-56
01/07/09	06/16/09	29/594
11/29/09	01/18/10	29/791-793
01/05/17	01/09/17	44/249
01/03/17	01/09/17	44/250
01/06/17	01/09/17	44/250
01/03/17	01/09/17	44/250-51

01/02/17	01/09/17	44/251
01/06/17	01/09/17	44/245-46
01/06/17	01/09/17	44/244
01/04/17	01/09/17	44/247
01/06/17	01/09/17	44/246
01/06/17	01/09/17	44/245
01/03/17	01/0-9/17	44/247-48
01/02/17	01/09/17	44/246
01/03/17	01/09/17	44/249
01/04/17	01/09/17	44/247
01/01/17	01/09/17	44/248
01/02/17	01/09/17	44/244
01/08/17	01/09/17	44/243
01/03/17	01/09/17	44/244-45
01/04/17	01/09/17	44/247
01/09/17	01/17/17	44/257
01/10/17	01/17/17	44/258
01/11/17	01/17/17	44/258
01/09/17	01/17/17	44/258
01/13/17	01/17/17	44/257
01/19/17	01/23/17	44/261
01/17/17	01/23/17	44/261
01/16/17	01/23/17	44/261
01/23/17	01/30/17	44/264
01/23/17	01/30/17	44/264
01/23/17	01/30/17	44/264
01/29/17	02/06/17	44/267
01/29/17	02/06/17	44/267-68
02/09/17	02/16/17	44/272-73
02/09/17	02/16/17	44/273
02/10/17	02/16/17	44/273
03/14/17	03/20/17	44/287
03/16/17	03/20/17	44/284
03/19/17	03/20/17	44/285
03/20/17	03/20/17	44/286
03/16/17	03/20/17	44/286
03/13/17	03/20/17	44/2854

02/09/17	03/20/17	44/286
03/29/17	04/02/17	44/292
03/29/17	04/10/17	44/296
05/22/17	06/05/17	44/311
05/22/17	06/05/17	44/311
05/23/17	06/15/17	44/312
05/24/17	06/05/17	44/315
05/13/17	06/15/17	44/319
06/19/17	06/22/17	44/321
06/28/17	06/29/17	44/322
09/19/17	09/25/17	44/341
09/11/17	09/25/17	44/341
10/10/17	10/18/17	44/348
02/27/07	06/17/07	27/550
09/04/06	01/28/07	27/146-47
05/03/07	06/17/07	27/547-48
02/27/07	06/17/07	27/554-55
10/20/06	06/17/07	27/544-45
02/25/07	06/17/07	27/543-44
2/25/07	06/17/07	27/542-43
05/18/07	06/17/07	27/556
01/18/07	02/27/07	27/338-339
01/12/17	01/23/17	44/262
07/20/17	07/31/17	44/331
04/21/17	04/27/17	44/303
04/23/17	05/09/17	44/305
04/04/17	06/22/17	44/322
03/30/23	04/04/23	54/298
03/28/23	04/04/23	54/297
04/05/23	04/10/23	54/303
04/04/23	04/10/23	54/303
04/04/23	04/10/23	54/304
03/07/23	04/10/23	54/305
04/07/23	04/10/23	54/304
04/05/23	04/17/23	54/308
04/12/23	04/17/23	54/314
04/05/23	04/19/23	54/314

04/19/23	04/24/23	54/317
04/20/23	04/24/23	54/319-20
04/21/23	04/24/23	54/315
04/21/23	04/24/23	54/316
04/20/23	04/24/23	54/319
04/11/23	04/24/23	54/316
04/20/23	04/24/23	54/318
04/19/23	04/24/23	54/317
04/19/23	04/24/23	54/318
04/20/23	04/24/23	54/319
04/12/23	05/01/23	54/324
04/25/23	05/01/23	54/326
05/24/23	06/01/23	54/347
04/26/23	05/01/23	54/325
04/26/23	05/01/23	54/323
04/04/23	05/01/23	54/327
04/26/23	05/01/23	54/323
04/27/23	05/01/23	54/325
04/27/23	05/01/23	54/324
05/05/23	05/08/23	54/328
05/12/23	05/16/23	54/334
05/04/23	05/16/23	54/333
05/12/23	05/23/23	54/338
05/25/23	05/29/23	54/342
05/24/23	05/29/23	54/346
05/25/23	05/29/23	54/344
05/23/23	05/29/23	54/344
05/24/23	05/29/23	54/345
05/24/23	05/29/23	54/345
05/29/23	06/06/23	54/354
05/26/23	06/06/23	54/351
04/21/23	06/06/23	54/352
05/04/23	06/06/23	54/351
05/04/23	06/06/23	54/353
05/04/23	06/06/23	54/353
05/04/23	06/13/23	54/363

05/04/12	06/13/23	54/361
06/01/23	06/19/23	54/364
06/04/23	06/19/23	54/363
05/04/23	07/06/23	54/373
05/25/23	01/15/24	54/460
01/28/36	01/28/26	79/603
09/24/24	09/24/24	54/620
09/30/24	10/07/24	54/632
09/30/24	10/07/24	54/633
10/02/24	10/07/24	54/633
10/03/24	10/07/24	54/634
10/04/24	10/07/24	54/631
10/04/24	10/07/24	54/631
10/04/24	10/07/24	54/634
10/01/24	10/14/24	54/644
10/01/24	10/07/24	54/632
10/31/24	11/11/24	54/661
11/07/24	11/11/24	54/662
12/05/24	12/09/24	54/671
12/10/24	12/24/24	54/680
12/30/24	01/01/25	54/684
12/30/24	01/01/25	54/684
12/19/25	12/22/25	65/57
02/11/26	02/16/26	65/87
06/13/26	07/02/26	65/130
06/13/26	07/02/26	65/130
05/12/59	07/01/59	264/531
06/30/59	07/14/59	265/207
06/29/59	07/14/59	265/203
02/18/25	02/20/25	54/722
10/15/29	10/22/29	74/149
11/08/29	11/12/29	74/156
12/11/33	12/27/33	79/165
12/01/31	01/16/32	74/479
09/28/34	09/29/34	79/242
10/22/34	10/24/34	79/296
05/23/44	09/26/44	114/48

05/25/44	09/26/44	114/47
10/25/44	10/31/44	114/71
09/14/50	10/19/50	163/493
09/27/50	10/19/50	163/494
07/30/52	08/07/52	184/219
09/27/55	09/30/55	18/408
03/13/58	03/27/58	249/232
12/03/57	03/27/58	249/234
03/11/58	03/27/58	249/236
01/29/58	03/27/58	249/238
02/20/58	03/27/58	249/240
03/21/58	03/27/58	249/242
02/25/58	03/27/58	249/244
12/11/57	03/27/58	249/246
12/03/57	03/27/58	249/248
03/19/58	03/27/58	249/250
02/19/58	03/27/58	249/252
05/09/58	06/10/58	251/360-61
05/15/58	06/10/58	251/362-63
05/09/58	06/10/58	251/364-65
05/05/58	06/24/58	252/22
02/17/59	03/03/59	260/220
09/16/58	09/23/58	255/96
07/01/59	08/13/59	266/112
06/26/59	08/13/59	266/142
06/26/59	08/13/59	266/132
06/29/59	08/13/59	266/118
06/29/59	08/13/59	266/120
06/26/59	08/13/59	266/122
07/07/59	08/13/59	266/124
07/02/59	08/13/59	266/126
06/29/59	08/13/59	266/134
07/01/59	08/13/59	166/114
08/05/59	08/13/59	266/144
08/18/59	08/24/59	266/285
07/01/59	08/13/59	266/116
06/26/59	08/13/59	266/128

07/02/59	08/13/59	266/136
07/02/59	08/13/59	266/138
07/26/60	07/28/60	276/547
05/17/65	05/17/65	337/234
05/17/65	05/17/65	337/240
05/17/65	05/20/65	337/320
05/17/65	05/20/65	337/323
05/26/65	06/02/65	338/28
06/02/65	06/24/65	338/480
05/20/65	06/24/65	338/492
07/01/65	07/06/65	339/157
07/01/65	07/06/65	339/163
07/16/65	07/20/65	339/484
07/29/65	08/03/65	340/232
07/06/65	08/09/65	340/349
09/20/65	10/01/64	342/208
01/04/65	01/14/65	332/431
02/04/65	02/11/65	333/468
06/29/65	07/01/65	339/327
06/29/65	07/14/65	339/343
06/29/65	07/14/65	339/340
06/29/65	07/14/65	339/336
06/29/65	09/25/65	342/95
10/09/65	10/13/65	342/449
09/29/66	10/17/66	356/267
08/13/57	09/03/57	243/247
08/12/57	09/03/57	243/249
08/12/57	09/03/57	242/251
08/12/57	09/03/57	243/253
08/16/57	09/03/57	243/255
08/08/57	09/03/57	243/257
09/04/57	09/06/57	243/318
09/04/57	09/06/57	243/320
02/02/59	03/26/59	261/149
02/17/59	03/26/59	261/153
12/01/67	12/01/67	370/482
01/25/68	02/01/68	372/437

02/07/68	03/07/68	374/9
02/08/68	03/07/68	374/13
09/28/67	10/13/67	369/48
02/12/67	12/18/67	371/265
12/13/67	12/18/67	371/2707
11/16/67	11/29/67	370/427
10/10/67	10/13/67	369/51
11/29/67	01/23/68	372/281
11/08/67	11/29/67	370/415
12/28/67	01/05/68	372/14
02/13/68	02/15/68	373/100
02/15/68	02/21/68	373/230
02/13/68	02/15/68	373/98
04/03/69	04/08/69	388/231
04/07/38	04/15/38	87/569
04/11/38	04/15/38	87/571
03/23/38	04/15/38	87/573
04/09/38	04/15/38	87/571
04/09/38	04/15/38	87/568
04/09/38	04/15/38	87/573
03/24/38	03/25/38	87/552
04/11/38	04/15/38	87/568
05/12/38	05/13/38	87/600
04/09/38	04/15/38	87/572
04/12/38	05/29/38	87/592
04/09/38	04/15/38	87/570
04/20/38	04/22/38	87/583
03/18/38	04/23/38	87/584
11/13/66	12/15/66	358/183
05/17/67	01/24/68	372/310
05/26/67	06/07/67	363/569
05/26/67	06/07/67	363/572
12/13/66	12/15/66	358/180
02/10/59	03/26/59	261/151
03/27/68	04/09/68	375/362
03/27/68	05/01/68	376/298
09/04/68	09/05/68	381/82

03/28/59	04/01/59	261/306
03/27/68	04/29/68	376/242
02/12/68	02/12/68	373/15
02/08/68	02/12/68	373/18
02/13/68	02/20/68	373/168
03/15/68	03/16/68	374/291
03/14/68	03/16/68	374/294
03/25/68	03/26/68	374/584
04/01/68	04/04/68	375/227
03/27/68	04/04/68	375/230
03/28/68	04/04/68	375/233
03/29/68	04/04/68	375/236
03/21/68	04/04/68	375/240
03/29/68	04/04/68	375/244
04/09/68	04/10/68	375/370
04/12/68	04/13/68	375/435
04/12/68	04/13/68	375/438
04/09/68	04/18/68	375/534
04/09/68	04/18/68	375/538
4/20/68	04/23/68	376/81
04/15/68	04/23/68	376/84
04/26/68	04/30/68	376/253
05/06/68	05/07/68	376/461
05/15/68	05/16/68	377/21
05/13/68	05/16/68	377/18
05/23/68	05/24/68	377/248
06/17/68	06/20/68	378/285
07/11/68	07/17/68	379/215
07/05/68	07/17/68	379/218
10/24/68	10/28/68	383/33
12/28/68	01/07/69	385/258
03/11/69	03/13/69	387/282
07/07/69	07/18/69	392/153
06/14/69	07/18/69	392/156
07/09/69	07/18/69	392/160
08/05/69	08/06/69	393/32
08/06/69	08/29/69	393/494

09/18/69	09/23/69	394/411
09/18/69	09/23/69	394/415
10/07/69	10/22/69	395/407
11/07/69	11/10/69	396/102
11/24/69	12/06/69	397/154
11/24/69	12/08/69	397/149
01/26/70	02/02/70	398/449
01/28/70	02/02/70	398/455
01/28/70	02/02/70	398/452
04/23/68	02/02/70	398/459
10/14/68	02/16/73	Judgment Roll No. 36800/ Box 939
04/04/70	04/14/70	401/209
07/30/69	08/18/69	393/245
02/14/71	02/23/71	98/476
07/29/70	02/23/71	98/477
01/21/29	02/21/30	74/159

Lancaster County, South Carolina

05/13/54	05/19/54	J4/29
07/20/55	08/02/55	MA/?
12/21/37	12/22/37	I-3/63
12/21/37	12/22/37	I-3/64
01/04/38	01/04/38	I-3/88
01/04/38	01/04/38	I-3/91
01/03/38	01/04/38	I-3/85
01/03/38	01/04/38	I-3/84
06/01/38	06/06/38	I-3/180
04/15/38	04/15/38	I-3/156
05/01/38	?	?
01/03/38	01/04/38	I-3/81-82
01/04/38	01/04/38	I-3/90
03/15/38	05/11/38	15/551
06/03/38	07/25/38	I-3/195-96
04/01/38	07/20/38	I-3/193-94

01/04/38	01/14/38	I-3/86-87
03/10/38	03/25/38	I-3/139-40
01/11/38	01/12/38	I-3/102
01/12/38	01/12/38	I-3/104
01/04/38	01/04/38	I-3/89
01/03/38	01/04/38	I-3/83
01/11/38	01/12/38	I-3/101
04/05/38	04/13/38	I-3/155
01/26/38	01/26/38	I-3/116-17
07/06/67	?	?
05/13/68	05/16/68	Z-5/245
05/03/68	05/17/68	Z-5/255
05/23/68	05/28/68	Z-5/335
05/25/68	05/28/68	Z-5/338
05/27/68	05/28/68	Z-5/336
05/27/68	05/28/68	Z-5/339
05/28/68	06/06/68	Z-5/391
05/25/68	07/09/68	Z-5/527
07/03/68	07/09/68	Z-5/523
06/11/68	07/09/68	Z-5/526
07/03/68	07/09/68	Z-5/524
07/31/68	08/13/68	Z-5/673
07/15/68	09/18/69	Z-5/2591
10/26/68	11/13/68	Z-5/1056
06/11/68	12/23/68	Z-5/1204
02/10/69	02/20/69	Z-5/1470
02/20/69	04/15/69	Z-5/1745
12/04/68	07/17/69	Z-5/2268
06/10/69	07/17/69	Z-5/2269
08/08/69	08/26/69	Z-5/2585
10/07/69	10/20/69	Z-5/2749
09/22/69	10/22/69	Z-5/2753
11/20/69	11/25/69	Z-5/2919
11/21/69	12/06/69	Z-5/2967
02/24/70	03/02/70	A-6/304
03/03/70	03/05/70	A-6/326
05/05/70	05/18/70	A-6/642

Chester County, South Carolina

01/04/17	01/09/17	167/64
02/13/34	02/13/34	269/215
02/13/34	02/19/34	269/217
02/06/34	02/19/34	269/218
02/12/34	02/19/34	269/218
01/30/34	02/21/34	269/219
02/21/34	02/23/34	269/221
03/07/34	02/31/34	269/228
07/31/34	09/17/34	269/259
9/21/49	10/21/49	357/200
11/26/53	12/10/53	375/141
01/28/54	02/11/54	379/91
10/07/53	03/12/54	375/199
10/18/51	12/21/51	D-4/302
02/22/68	04/30/68	Z-5143

York County, South Carolina

09/28/68	10/15/68	382/321
07/03/68	07/05/68	378/548
07/08/15	07/12/15	43/327
07/25/60	07/28/60	276/550
03/28/59	04/01/59	261/302
04/15/69	04/16/69	388/369
10/11/24	10/14/24	54/641
07/27/23	01/15/24	59/311
10/11/24	10/14/24	54/640
05/02/67	05/12/67	363/45
11/22/66	12/01/66	357/505
11/19/29	11/27/29	74/159
10/23/67	10/25/67	369/308
01/13/69	01/17/69	385/403
11/16/67	11/20/67	370/260
07/13/68	08/13/68	380/217
04/12/65	04/20/65	336/168
03/27/68	04/29/68	376/239
01/03/36	01/29/36	86/135

08/13/66	08/23/66	354/355
01/31/56	02/10/56	223/394
10/16/41	10/21/41	98/516
01/31/56	02/10/56	223/399
11/19/29	11/26/29	74/158
04/06/68	04/08/68	375/343
06/15/68	06/17/68	378/194
02/16/68	02/19/68	373/152
03/07/68	03/07/68	374/1
02/13/68	02/15/68	373/88
12/16/67	12/18/67	371/273

Summary judgment is affirmed as to the following tracts for that portion of the land that is below 570 feet above mean sea level:

05/28/26	08/30/26	65/146
07/08/24	07/12/24	61/145
12/09/24	12/18/24	62/178
09/17/24	10/03/24	62/3
09/08/24	09/17/24	61/283
07/29/25	08/13/25	64/132
09/22/24	10/01/24	54/628
07/08/24	07/10/24	61/134
09/24/24	10/01/24	54/623
11/17/24	11/19/24	62/104
05/03/28	05/11/28	71/251
03/19/09	01/07/10	29/778-80
09/17/24	10/03/24	61/314
11/25/24	12/04/24	62/144
06/14/04	08/13/04	24/187-88
12/16/25	01/15/26	66/166
10/14/24	10/18/24	62/36
03/17/25	03/24/25	63/128
07/31/24	08/09/24	61/183
07/24/25	08/05/25	64/137
12/30/10	01/02/11	32/56
07/31/24	08/09/24	54/599

08/08/24	08/16/24	61/208
09/10/24	09/17/24	54/616
06/04/24	06/07/24	61/69
07/08/24	07/12/24	61/143
03/31/24	04/02/24	60/243
03/29/24	04/02/24	60/244
03/19/09	01/07/10	29/773-76
03/19/09	01/07/10	29/776-78
05/11/00	06/13/00	19/621-33
05/10/32	06/01/32	74/540
12/19/27	12/21/27	65/303
09/01/25	12/05/25	65/48
Amend., A & B, (1015-1018)		III (all tracts below)

York County, South Carolina

05/11/00	06/13/00	19/621-633
09/01/25	12/05/25	65/48
09/01/25	12/05/25	65/53
12/19/27	12/21/27	65/303
05/10/32	06/01/32	74/540
08/05/36	08/05/36	87/138
05/28/26	08/30/26	65/146
07/08/24	07/12/24	61/145
12/09/24	12/18/24	62/178
09/17/24	10/03/24	62/3
09/08/24	09/17/24	61/283
07/29/25	08/13/25	64/132
09/22/24	10/01/24	54/628
07/08/24	07/10/24	61/134
09/24/24	10/01/24	54/623
11/17/24	11/19/24	62/104
05/03/28	05/11/28	71/251
03/19/09	01/07/10	29/778-80
09/17/24	10/03/24	61/314
11/25/24	12/04/24	62/144
06/14/04	08/13/04	24/187-88

12/16/25	01/15/26	66/166
10/14/24	10/18/24	62/36
03/17/25	03/24/25	63/128
06/05/24	06/07/24	61/68
07/31/24	08/09/24	61/183
09/08/24	09/17/24	61/283
07/24/25	08/05/25	64/137
12/30/10	01/02/11	32/56
07/31/24	08/09/24	54/599
08/08/24	08/16/24	61/208
09/10/24	09/17/24	54/616
06/04/24	06/07/24	61/69
03/19/26	04/09/26	2-P/19 Plat Book
07/08/24	07/12/24	61/143
03/31/24	04/02/24	60/243
03/29/24	04/02/24	60/244
03/19/09	01/07/10	29/773-76
03/19/09	01/07/10	29/776-78
05/11/00	06/13/00	19/621-33
05/10/32	06/01/32	74/540
12/19/27	12/21/27	65/303
09/01/25	12/05/25	65/48
05/21/30	05/28/30	74/231
05/18/25	12/24/25	65/61
09/03/24	09/17/24	54/623
09/24/24	10/01/24	54/623
09/08/24	09/17/24	54/617
09/23/24	10/01/24	54/622
09/01/25	12/05/25	65/53
06/27/36	08/05/36	87/138

Defendant	*Portion of Judgment Order Describing Parcel*	*Section of this Opinion Addressing Objections*
11. Crescent Resources, Inc.	One, Q, (901)	III, n.5 (All tracts*)
	Land conveyed to Crescent by D.M. Creech and Margaret F. Creech by deed dated December 29, 1983, and recorded in the Office of the Clerk of the Court for York County, South Carolina, on December 29, 1983, in Deed Book 736 at page 298.	
	Two, B, (957-958)	IV-A, III, n.5 (All tracts*)

Date of Deed	*Recordation Date*	*Book/Page*
03/27/70	03/27/70	400/466
05/22/70	05/22/70	402/527
03/27/70	03/27/70	400/463
03/27/70	03/27/70	400/470
03/27/70	03/27/70	400/468
05/22/70	05/27/70	402/521
05/14/70	05/18/70	402/309
06/03/70	06/09/70	403/259
05/22/70	05/27/70	402/524
06/03/70	08/10/70	405/369

12. State of South Carolina	One, R, (902-905)	III (All tracts*)
Date of Conveyance	*Book*	*Page*
06/02/1893	M13	1
06/31/05	25	157
12/30/1893	134	385
02/01/07	27	208
04/24/1897	20	655
03/05/29	73	153
02/??/29	65	548
02/??/29	65	546
02/25/29	73	155
06/03/19	50	6
10/06/20	48	189
10/04/20	53	205
04/15/19	50	4
07/06/20	53	17
02/19/41	103	198
06/04/30	76	455
06/04/30	76	457
02/26/29	73	154
07/02/20	48	736
11/15/20	?	?
09/24/10	37	97
08/21/19	50	5
07/20/20	52	13
02/19/41	103	199
03/16/56	231	444
08/31/26	68	19
10/02/19	48	344
08/16/19	44	662
07/01/19	49	369
05/14/20	?	?
06/24/20	53	99
07/29/20	44	716

04/24/1897	20	653
02/20/06	26	172
07/12/06	26	649
01/31/06	25	595
02/23/06	26	174
01/20/22	56	155
01/11/26	66	181
01/11/26	65	73
02/22/22	56	128
07/01/07	28	186
03/12/19	44	569
11/27/05	26	173
04/24/1897	20	651
08/07/61	289	314
08/31/18	47	132
07/29/18	47	210
05/17/19	44	636
06/02/19	44	621
05/17/61	286	453
08/23/29	75	161
12/28/12	40	321
12/06/12	40	302
12/06/12	36	624
12/16/12	36	622
09/29/25	64	209
12/31/25	66	133
07/29/20	53	123
12/12/18	47	258
01/12/20	51	122
12/18/18	47	256
02/20/63	308	507
08/17/48	140	88
10/28/30	77	131
12/23/11	38	389
12/19/11	38	390
08/02/65	340	220

03/04/10	35	331
12/28/15	45	41
11/14/1893	M13	112
05/27/32	81	18
10/01/62	305	453
09/27/62	305	457
04/26/63	311	553

13. Southern Railway Company — One, S, (906-916) — III, n.5 All tracts*)

Date of Conveyance	*Book*	*Page*
9/22/1848	P	450
10/02/1848	O	366
09/23/1848	O	367
09/23/1848	O	367
03/01/1899	18	575
05/05/1853	Q	143
10/11/48	129	335
09/26/1848	O	365
09/22/1848	O	364

Deed from Dr. William Moore to C&S C.P. Railroad dated April 25, 1949

11/21/02	22	541
11/21/02	22	541

Memorandum of Agreement Town of Fort Mill dated 07/17/24

03/01/40	98	228

Ordinance from the Town of Fort Mill dated 03/06/40

03/01/40	98	228

Agreement Deed Book 129 at page 335 dated 10/11/48

Deed dated 9/21/56 from Springs Foundation, Inc.
Deed from Dr. William Moore dated 4/25/1849
Deed from J.L. Moore dated 7/24/1854
Deed from William E. White dated 02/07/1856 and recorded in Deed Book R at page 37

09/20/1848	O	460
06/13/01	21	736
04/8/20	44	783
1/15/1917	44	266
09/12/46	114	396
5/18/46	124	177

Deed from Eli Biggers dated 12/22/1847
Condemnation Proceeding Robert Miller Spring term 1853
Deed from James Moore by J.C. Moore dated 12/22/1848
Jane McNair and Jane Henry dated 12/22/1847

9/20/1848	O	459
9/19/1848	O	460

Deed from James Workman dated 12/22/1847
Deed from J.C. Moore dated 12/12/1848

9/20/1848	O	463

Deed P 450 dated 10/21/1851
Deed 23 at page 68 dated 5/26/1903
Deed 39 at Page 71 dated 12/19/1911
Deed Q at Page 251 dated 2/14/53
Deed 100 at Page 233 dated 6/30/43
Deed 19 at page 472 dated 3/26/1900
Deed 22 at page 473 dated 11/24/1902
Deed 35 at page 563 dated 3/10/1911
Deed 35 at page 567 dated 3/10/1911
Agreement with Catawba Lumber Company dated 2/9/18
Deed from Victoria Cotton Mills dated 6/1/1916

11/21/1918	44	523

Deed 100 at page 233 dated 6/30/43
Deed 176 at page 334 dated 10/16/51
Deed from James Workman dated 12/22/1847 9/19/1848 and

9/1/1848	O	462
9/18/1848	O	459
9/5/1848	O	575

7/22/65	341	446
9/5/1848	O	461
9/16/1848	O	463
Deed GG at page 495 dated 7/4/1849		
4/4/1850	GG	614
7/12/1849	GG	49G
5/10/1887	E-6	706
Deed E-6 at page 712-3 dated 6/16/1887		
Deed E-6 page 708-9/10 dated 6/16/1887		
6/16/1887	E-6	712-3
9/7/1888	F-7	712-13
6/15/1887	E-6	716
6/1/1887	E-6	712-3
6/11/1887	E-6	710-11
2/25/1900	29	514
6/15/1887	E-6	714
8/20/1918	44	479
11/1/1961	293	258
6/15/1887	E-6	714
10/1889	J-10	735
9/21/1888	F-7	673
9/21/1888	E-7	675
Deed from F.H. Barber dated 3/30/1906, Deed E-6, page 6		
98-1 dated 5/9/1887		
5/8/1888	J-10	725-6
9/21/1888	F-7	676
9/21/1883	F-7	688
5/10/1890	E-6	692-3
5/1887	E-6	695
2/1/1886	J-10	723
5/9/1887	E-6	694
1880	E-6	686
Condemnation involving property of W.H. Cowan dated 7/5/1889		
Condemnation involving property of Mr. R.B. Cowan dated 2/10/1888		

Property of R.M. Cowan judgment dated 11/21/1889
Condmenation R.H. Cowan 11/11/1889

5/21/1887	E-6	704
9/4/1906	26	443

Condemnation involving property of W.I. Steele dated 4/30/1889

9/10/1913	39	398

Condemnation involving property of Samuel L. Fewell dated 2/11/1888, Judgment Roll 1710

10/30/1911	44	194
9/10/1913	39	398

Condemnation involving property of Mrs. Margaret S. Kimbrell dated 4/30/1888, Judgment Roll 1753

1/23/1904	23	550-3
1/25/1904	23	550-3

Condemnation proceeding involving property of Larry W. White dated 5/18/1888, Judgment roll 1750
Condemnation involving property of A.H. White, James S. White, Mary E. White, A.H. White and Mrs. A.R. Witherspoon dated 1/24/1888, Judgment rolls 1752 and 1751

10/18/1901	29	666

Condemnation involving property of Isabella Wilson October term 1920

10/18/09	29	666

Condemnation involving the property of J.S. White, et al. dated 1/24/1885, Judgment Roll 1751
Ordinance City of Rock Hill, Minute Book 425 dated 8/20/45

3/25/09	29	602
3/25/1908	29	259

Condemnation involving the property of Fewell, Judgment Roll 1900
Deed from A.D. Holler dated 5/24/1896
Condemnation involving property of Isabella H. Wilson, Executrix, October Term 1920

Deed from A.D. Holler dated 3/22/1890

2/13/1905	24	732

Condemnation of property of Samuel A. Fewell dated 2/11/1888, Judgment roll 1720

Condemnation of property of W.A. Fewell dated 7/22/1887, Judgment roll 1716

Condmenation involving property of Robert Morrison, Judgment roll 1884

4/11/1887	E-6	700-1
4/11/1887	E-6	790-791
4/11/1887	E-6	758-9
4/9/1887	F-7	17

Condemnation of property of J.A. Rainey dated 4/16/1889, Judgment roll 1905

4/11/1887	E-6	770-1
9/22/1887	F-7	673
4/11/1887	E-6	798
9/22/1913	39	386
6/2/1888	F-7	565-6-7
3/26/1888	J-10	727
9/10/1901	21	466-7
10/5/1901	23	792-3

Deed from Yorkville Cotton Oil Co. dated 10/22/1915

8/4/11	38	169
3/26/1888	E-J-10	727
8/4/1911	38	189
6/23/1911	38	17
11/25/1907	38	779
7/24/1894	24	7

Condemnation of property of William C. Latimer dated 8/31/1887, Judgment roll 1717

Resolution Town Council of Yorkville dated 6/16/1887

4/11/1887	E-6	798
4/11/1887	E-6	770-1
4/9/1887	F-7	50
5/26/1887	F-7	1
6/2/1888	F-7	567-68

4/9/1887	F-7	52
4/9/1887	F-7	15

Condemnation involving property of A. Avery dated 6/18/1888, Judgment roll 1787

6/28/1887	F-7	337
7/4/1887	J-10	722

Condemnation involving property of D.S. Thornbury dated 6/18/1888, Judgment roll 1788

6/26/1867	F-7	339
6/24/1887	E-6	721
7/25/1887	F-7	335
6/21/1887	E-6	749
7/25/1887	F-7	335
6/7/1887	E-6	751
7/16/1887	E-6	756-57
5/10/1887	E-6	698
8/29/1887	F-7	334
8/29/1887	F-7	334
6/27/1887	F-7	563
6/1887	F-7	562
5/21/1887	E-6	706-7-8

Condemnation of property of B.D. Wheeler dated 8/25/1887, Judgment roll 1715

4/13/1887	E-6	788-9
5/27/1887	F-7	7
4/13/1887	E-6	788-9
4/12/1887	E-6	794-5
4/13/1887	E-6	788-9
4/12/1887	E-6	792
4/4/1887	F-7	25
3/8/1889	G-8	657

Decree involving property of Mrs. Eudora Plexico, et al dated 2/3/34

4/4/1887	F-7	25
3/8/1889	G-8	657
4/12/1887	F-7	3
3/4/1887	E-6	768-9

3/4/1887	E-6	766-7
3/4/1887	F-7	27
3/4/1887	F-7	13
3/4/1887	F-7	48
3/4/1887	F-7	13
6/27/56	230	280
3/4/1887	F-7	13
3/4/1887	F-7	11
4/12/1887	F-7	32
3/2/1887	F-7	498
5/3/1887	F-7	30
3/2/1887	E-6	764-5
5/6/1887	E-6	772-3
5/6/1887	E-6	772-3
5/6/1887	F-7	34
5/3/1887	F-7	30
3/1/1887	E-6	760-1
3/1/1887	E-6	778-9
4/7/1877	F-7	5
3/1/1887	E-6	796-7
3/1/1887	E-6	774-5
9/21/1889	G-8	655
3/4/1887	F-7	19-20
3/1/1887	E-6	786-7
9/21/1889	G-8	655
3/2/1887	F-7	46
3/1/1887	E-6	780-1
7/1/1890	71	613
8/10/1907	6	20
11/9/1887	Q	70
11/14/1877	Y	17
11/14/1896	U	138
6/12/1875	A-1	164
3/2/1887	Q	70
11/14/1871	Y	12
4/29/1910	37	57
2/15/1891	P	299

1/17/09	74	680
12/12/1854	Q	551
1/12/1903	72	549
10/30/09	23	163
7/17/1891	A-11	73
7/24/1891	A-11	34
8/5/1896	17	762
4/14/1904	33	393
4/10/1907	29	683
Agreement Victor Cotton Oil Co. 4/18/1902		
8/30/1907	22	307
5/19/1903	77	23
5/25/1903	29	377
Agreement Beverly Mfg. Co. dated 10/15/1903		
12/8/1906	66	87
12/4/1902	22	790
Deed from M.J. Brown dated 9/1/1903		
Deed from B.M. Smith, et al dated 11/14/1901		
6/23/1901	96	470
7/8/1901	90	467
4/26/02	7	297
4/8/1902	7	279
4/21/1902	7	279
4/17/09	29	3
Agreement Hawthorne Spinning Mills 1/29/1906		
Agreement Clover Cotton Mills 7/10/1909		
Agreement W.D. Reynolds 11/15/1916		
Deed 27-656 dated 9/17/1907		
Deed 36-525 dated 2/20/1912		
1/27/1899	16	234
4/26/1942	100	63

14.	Bowater, Inc.	One, T, (917-919)	III (All tracts*)
		547-00-00-045	II (farm)

Date of Conveyance	*Book*	*Page*
6/22/62	300	146
6/22/62	300	144
6/22/62	100	142
8/30/56	231	63
10/17/56	232	443
8/31/56	231	108
8/29/56	231	85
8/29/56	231	87
9/1/56	231	111
8/23/56	232	129
11/2/56	233	124
8/23/56	233	122
8/29/56	231	60
8/29/56	231	66
8/29/56	231	73
8/29/56	231	76
8/29/56	231	79
8/29/56	231	82
8/29/56	231	54
8/29/56	231	51
8/27/56	231	60
6/20/56	233	102
8/9/56	233	112
8/18/56	233	114
8/31/56	233	120
9/7/56	233	117
8/29/56	232	293
10/13/56	232	296
8/31/56	231	120

Three, V, (995) III (All tracts*)

Date of Conveyance	*Book*	*Page*	
9/20/60	279	44	II (dates)
9/1/60	278	158	II (dates)
11/14/61	294	61	II (dates)
8/1/85	838	205	n.10 II (tree) VI
10/9/61	291	340	II (tree)
10/6/86	?	?	II (tree)
10/25/65	343	311	II (tree)
9/16/69	394	284	II (tree)
4/11/59	V4	221	II (tree)
12/21/84	798	276	II (tree)
2/14/86	904	111	II (tree)
7/31/86	898	7	II (tree)
8/86	899	296	II (tree)

Defendant	*Portion of Judgment Order Describing Parcel*[1]	*Section of this Opinion Addressing Objections*
15. Nisbet Properties	One, U, (920)	n.5, n.10, III, VII (All tracts*)
	Tax Map Number	
	22-00-01.00	IV-E, F II (tree) VI
	13-00-100.00	IV-F II (tree) VI
	19-00-01.00	II (tree)
	19	VI

16.	John M. Spratt, Jr.	One, V, (921) Tract 1 (Tax Map 20-01-22-12) Tract 2 (922) (Tax Map 708-17; 21-01-21-02 and 20-06-01-50) Tract 3, (924) (Part of Tax Map 708-17) Tract 4, (925) (Part of Tax Map 708-17) Tract 5, (925-92[illegible] (Part of Tax Map 708-17) Tract 7, (927-930) (Part of Tax Map 708-17) Tract 8, (930) (Part of Tax Map 708-17) Tract 9, (930-931) (Part of Tax Map 708-17) Tract 10, (931-932) (Part of Tax Map 708-17) Tract 11, (932-933) (Part of Tax Map 708-17) Tract 12, (933) (Part of Tax Map 708-17)	III (All tracts below) n.5

		Tract 13, (933-934) (Part of Tax Map 708-17) Tract 14, (934-935) (Tax Map 661-14) Tract 15, (935-936) (Tax Map No. 708-18) Tract 16, (936) (Tax Map 661-00-00-014) Tract 17, (936-937) (Tax Map 020-02-01-006)	
17.	Hiram Hutchison, Jr.	One, W, (938-940)	III, n.5 (All tracts*)

Parcel 1 – Tax Map 664-00-00-012
Parcel 2 – Tax Map 664-00-00-011
Parcel 3 – Tax Map 627-18-04-003

18.	J. Max Hinson	One, X, (941-946)	III (All tracts below)
		Tract 3 – Tax Map 20-1.00 Tract 5 – Tax Map 707-1 Tract 10 – Tax Map 659-232 Tract 23 – Tax Map 740-1 Tract 25 – Tax Map 20-4-34-4	II (poss.)
		Three, W, (998) III, n.5 (All tracts below)	

(All tracts in York County, except Tract 4, which is in Lancaster County)

Tract 1 – Deed Book 132, page 26	
Tract 2 – Deed Book 165, page 183	
Tract 4 – Deed Book X-5, page 494	II (poss.)
Tract 6 – Deed Book 358, page 480	II (poss.)
Tract 8 – Deed Book 248, page 97	
Tract 9 – Deed Book 220, page 128	II (cont.)
Tract 11 – Deed Book 182, page 26	II (cont.)
Tract 12 – Deed Book 353, page 346	II (cont.)
Tract 13 – Deed Book 337, page 532	II (poss.)
Tract 14 – Deed Book 242, page 454	II (cont.)
Tract 15 – Deed Book 286, page 398	II (cont.)
Tract 16 – Deed Book 270, page 485	II (cont.), n.5
Tract 17 – Deed Book 259, page 447	II (cont.), n.5
Tract 18 – Deed Book 217, page 361	II (cont.), n.5
Tract 19 – Deed Book 205, page 96	II (cont.), n.5

19.	Arnold F. Marshall	One, Y, (947)	III (All tracts below)
		Deed dated 1/18/66 recorded in Deed Book 222, page 152 on 1/28/66, York County	
		Deed dated 3/30/51 recorded in Deed Book 169, page 303 on 4/3/51; and deed dated 8/18/51 recorded __/21/51 in Deed Book 174, page 166	
		Deed dated 4/13/54 recorded in Deed Book 203, page 184	
20.	Ashe Farms	Three, F, (974)	III, n.5 (All tracts*)
		Tax Map 14-25	II (dates)
		Tax Map 15-2.0	II (dates)
		Tax Map 15.33	II (dates)
		Tax Map 24-1.0	II (dates)
		Tax Map 25N-OA-2.0	II (dates)
		Tax Map 25-10	II (dates)
		Tax Map 25-10.01	II (dates)
		Tax Map 764.5	II (dates)
		Tax Map 15-20	II (dates)
			II (cont.)
21.	Hugh White	Three, H, (976)	
		Tax Map 705-00-00-001	

22.	T.W. Hutchison	Three, K, (979-980)	III, n.5 (all tracts below)
		664-01-03-008	II (poss.)
		664-01-06-014	II (poss.)
		664-01-06-019	II (poss.)
		664-01-06-018	II (poss.)
		664-01-06-017	II (poss.)
		664-01-06-007	II (poss.)
		664-01-06-008	II (poss.)
		664-01-06-023	II (poss.)
		664-01-06-016	II (poss.)
		664-01-06-015	II (poss.)
		664-01-03-002	II (poss.)
		664-01-02-003	II (poss.)
		664-01-04-002	II (poss.)
		664-01-06-024	II (poss.)
		664-01-06-013	II (poss.)
		664-00-00-022	II (poss.)
			II (dates)
		634-07-01-021	II (poss.)
			II (dates)
		664-00-00-019	II (dates)
		664-01-02-002	
		627-14-02-002	
		664-06-06-025	II (dates)
		664-00-00-021	II (dates)
23.	Robert A. Fewell	Three, L, (981)	III (All tracts*)
		Tax Map 617-00-00-026	
		Tax Map 616-00-00-032	
		Tax Map 680-00-00-022	
		Tax Map 608-00-00-024	

24.	Francis M. Mack	Three, M, (982)	III (All tracts*)
		774-00-00-005	II (tree) II (farm) II (dates)
		020-06-06-016	
25.	John S. Simpson	Three, N, (983)	n.5, n.10, II (poss.), III, VI (All tracts*)
		Tax Map 600-07-06-001	
		Tax Map 600-11-02-035	
		Tax Map 600-17-02-012	
		Tax Map 627-17-02-018	
		Tax Map 627-17-02-016	
26.	Robert T. Simpson	Three, O, (984)	III, n.5 (All tracts*)
		627-17-02-019	n.10 II (poss.) VI
		600-06-10-029	II (poss.)
		600-07-05-001	n.10 II (poss.) VI
		600-11-02-035	n.10 VI
		627-17-01-012	n.10 II (poss.) VI
		627-17-02-018	n.10 II (poss.) VI

		627-17-02-016	n.10 II (poss.) VI
27.	City of Rock Hill South Carolina	Three, Q, (987-989)	III, II (concl.) (All tracts*)
		Tax Map or Parcel	
		627-18-3-4	IV-A
		589-1-1-14	IV-G
		628-9-5-5	n.10 VI VII
		628-9-5-6	n.10 VI
		628-17-3-10	n.10 VI
		628-4-1-2	n.10 VI
		627-19-1-25 (W.White)	VII
		627-19-1-25 (H.White)	VII
		627-19-1-25 (Biggers)	VII
		627-19-1-25 (LaFar)	VII
		627-19-1-25 (Albright)	VII
		627-19-1-25 (Roddey)	VII
		627-18-4-11 & 13	
		627-19-1-23	
		627-18-1-9	
		630-10-03-010	
		627-18-4-6	
		630-10-3-14	
		630-10-4-6	
		630-10-4-5	
		630-10-4-4	
		596-7-2-2	
		630-10-3-12	
		630-10-03-008	
		630-10-3-13	

630-10-4-7
630-10-4-3
630-10-01-002
628-4-1-1
627-19-1-23 (Friedheim)
627-19-1-23 (Johnston)
589-1-1-21
627-18-3-12
627-17-4-10
626-7-1-2
667-1-1-4
589-1-1-4
627-18-2-1
589-26-1-1
589-26-2-1 & 2
667-1-1-6

28.	Elizabeth Ardrey Grimball	Three, R, (990-991)	II (tree), II (farm), III (All tracts*)

Tax Map or Parcel

743-00-00-003
709-00-00-025
709-00-00-023
709-00-00-020
709-00-00-019
709-00-00-018
020-01-01-020

29.	John M. Belk	Three, S, (992) 963 acres described in Deed Book 53, page 403	II (tree fm.) II (farm) II (dates)

		dated 5/12/47; recorded 6/21/47	III
30.	Annie F. Harris	Three, T, (993) Tax Map 742-00-00-002	III
31.	William Oliver Nisbet	Three, U, (994)	III
		Tax Map 22-2	V
32.	Springs Mills, Inc.	Three, X, (1000-1003)	II (sp. pc.), III (All tracts*)

Date of Conveyance	*Book*	*Page*
12/31/31	74	503
9/20/41	105	106
4/5/65	335	431
6/16/88	1033	16
1/30/75	507	1
3/1/84	747	170
10/20/65	343	540
6/4/70	406	505
4/14/83	700	14
1/22/81	626	499
9/29/41	105	196
3/15/74	481	62
9/30/66	357	172
6/20/50	159	290
9/27/41	105	198

33.	Property Owned by the Close Family Three, Y, (1004-1007)	II (sp. pc.) III (All tracts*)

Property which has been identified by deed book and page is as follows:

Book	*Page*	*Date of Record*
271	147	1/26/60
308	125	2/01/63
362	341	5/01/67
383	81	10/29/68
462	483	5/14/73
521	45	10/14/75
527	467	3/16/76
561	607	12/16/77
570	874	5/10/78
576	231	8/10/78
585	703	1/03/79
601	876	9/07/79
614	262	5/21/80

Property which has been described by tax map code is as follows:

Tax Map Code

020 0101 004
020 0102 001
020 0404 001
020 0406 010
020 0406 011
020 0408 022
020 0408 023
020 0408 024
020 0408 025

020 0408 026
020 0408 027
020 0408 028
020 0408 029
020 0408 030
020 0408 031
020 0408 032
020 0419 002
020 0419 013
020 0419 014
020 0420 002
020 0424 014
020 0429 001
020 0429 025
020 0429 026
020 0429 070
020 0435 062
020 0504 008
020 0901 003
655 0000 001
655 0000 003
655 0000 031
657 0000 001
706 0000 001
706 0000 012
710 0000 002
710 0000 005
710 0000 006
712 0000 001
713 0000 059
713 0000 103
713 0000 164
713 0000 165
713 0000 181
713 0000 191
713 0000 200
713 0000 214

713 0000 215
713 0000 216
714 0000 001
715 0000 001
717 0000 016
730 0000 001
730 0000 002
730 0000 006
732 0000 001
732 0000 002
734 0000 006

Defendant	*Portion of Judgment Order Describing Parcel*	*Section of this Opinion Addressing Objections*
34. Elliott S. Close	Three, Y, (1006)	
	Tax Map 642-05	II
	Tax Map 642-034	II (tree) II (farm) II (poss.)
	Tax Map 642-035	II (tree) II (farm) II (poss.)
35. Archie B. Carroll	Three, Z, (1008)	III, VII (All tracts*)

Date of Conveyance	*Book*	*Page*	
3/30/82	660	84	II (poss.)
(Tax Map 745-00-00-001)			III
1/28/52	759	122	
(65 ft. access right of way)			

36. W.R. Simpson	Three, AA, (1009)	III (All tracts*)

		600-07-05-001	n.10 II (poss.) VI
		600-11-02-035	n.10 VI
		600-01-01-012	n.10 VI
		627-17-02-018	n.10 II (poss.) VI
		627-17-02-016	n.10 II (poss.)
		772-00-00-001	II (date)
		772-00-00-002	II (date)
37.	C & S National Bank	Three, BB, (1010)	II (concl.), III (All tracts*)
		Tax Parcel Number	
		659-227	
		719-15	
		20-6-1-47	
		653-13	
		627-20-2-3	
		626-141, 158, 159, 176, 177 & 178	
		736-092	
		546-65	
		598-10-01-001	
		662-3-1-30	
		662-3-1-31	
38.	Mary A. and W.T. McCorkle	Three, CC, (1011)	III (All tracts*)
		Tax Map 0013-00-037-00	

	Tax Map 0013-00-0037-00	
39. Springs Industries, Inc.	Four, A, (1024-1029)	II (sp. pc.), III (All tracts*)

Date of Conveyance	*Book*	*Page*
12/31/31	74	503
(Tax Map 020 04 04 010)		
9/29/41	105	196
7/12/66	353	327
4/24/70	402	404
7/29/70	408	450
8/25/70	406	500
8/27/70	406	503
(Tax Map 020 01 23 013)		
12/31/31	74	503
(Tax Map Nos. 02 06 01 52, 02 06 01 53, 02 06 07 34)		
1929	73	177
1929	73	178
1929 (Cutter)	65	559
1929 (Seital)	65	559
1934	79	231
1935	79	481
1938	94	267
1938	94	277
1938	94	279
1938	92	303
1938	92	318
1940	101	13
1940	102	83
1943	111	263
1943	111	264
1943	111	261
1943	111	262
1937	91	147

1937	91	148
1944	115	214
1945	116	276
1945	116	277
1945	116	275
1945	116	305
1945	117	1
1945	117	162
1950	159	290
1955	211	311
1960	274	42
1948	141	85
1953	191	95

Tax Map 598 04 01 001
Tax Map 598 04 02 001
Tax Map 598 11 01 001
Tax Map 598 22 01 001
Tax Map 627 20 01 005

Appendix C

The judgment of the district court is VACATED and the cause REMANDED for further action not inconsistent with section III of this opinion as to the following parcels of land. The affidavits supporting the defendants' motions for summary judgment as to these parcels set forth insufficient evidence that the statements therein are based on the personal knowledge of the affiant.

	Defendant	*Parcel*	*Section of this Opinion Rejecting Other Challenges to Listed Parcel*[3]
1.	Arnold F. Marshall	One, Y, ¶4, (947) Property described in deed dated Jan. 9, 1959 and recorded Jan. 17, 1959, in deed book 258 at page 484, York County.	
2.	C.H. Albright	Three, D, ¶3 (972) 620-00-00-005 620-00-00-008	
3.	Ned M. Albright	Three, E, ¶¶1, 3-8 (973)	n.5 (all)
		548-00-00-070	
		627-22-02-029	II (dates)
			II (cont.)
		593-02-01-002	
		598-02-01-002	II (dates)
			II (cont.)
		627-22-02-028	II (dates)

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[3] The Tribe has often raised more than one type of legal challenge to any given parcel. Because we have reviewed all such objections and found them to be without merit, the district court need not rehear those challenges on remand. In the interest of clarity we shall note, where applicable, the section of this opinion wherein any other challenge to such a parcel is considered and rejected.

		625-12-03-004	II (dates)
			II (cont.)
		600-06-07-006	II (dates)
			II (cont.)
		623-00-00-006	II (tree)
			II (dates)
		623-02-01-005	
4.	David G. Anderson	Three, G (975)	
		627-22-02-029	II (dates)
			II (cont.)
		598-02-01-001	II (dates)
			II (cont.)
		598-02-01-002	II (dates)
			II (cont.)
		627-22-02-028	II (dates)
		625-12-03-004	II (dates)
			II (cont.)
		600-06-07-006	II (dates)
			II (cont.)
		604-03-01-011	II (dates)
		670-00-00-134	n.10
5.	F.S. Barnes, Jr.	Three, J (978)	II (dates)
		639-00-00-095	
6.	J. Max Hinson	Three, W (998-999)	
		Tract No. 20, York County	II (poss.)
		deed book 986, p. 339	n.5
		Tract No. 21, York County	n.5
		deed book 969, p. 200	II (poss.)
			II (dates)
		Tract No. 22, York County	n.5

deed book 540, p. 129	II (poss.) II (dates)
Tract No. 24, York County deed book 488, p. 98	II (dates) II (cont.)
Tract No. 26, York County deed book 644, p. 72	
Tract No. 28, York County deed book 529, p. 561	II (dates)
Tract No. 30, York County deed book 467, p. 466	II (poss.)

Appendix D

The judgment of the district court is VACATED and the cause REMANDED for further action not inconsistent with section IV.B. of this opinion as to the following parcels.

Defendant	*Parcel*	*Section of this Opinion Rejecting Other Challenges to Listed Parcel*[4]
1. Duke Power Co.	Two, A, (954-956)	

Summary judgment is vacated and remanded as to the following tracts for that portion of the land that is above 570 feet above mean sea level:

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[4] See *supra* Appendix C n.3.

Date of Deed	*Recordation Date*	*Book/Page*
05/28/26	08/30/26	65/146
07/08/24	07/12/24	61/145
12/09/24	12/18/24	62/178
09/17/24	10/03/24	62/3
09/08/24	09/17/24	61/283
07/29/25	08/13/25	64/132
09/22/24	10/01/24	54/628
07/28/24	07/10/24	61/134
09/24/24	10/01/24	54/623
11/17/24	11/19/24	62/104
05/03/28	05/11/28	71/251
03/19/09	01/07/10	29/778/80
09/17/24	10/03/24	61/314
11/25/24	12/04/24	62/144
06/??/04	08/13/04	24/187-88
12/16/25	01/15/26	66?/166
10/14/24	10/18/24	62/36
03/17/25	03/24/25	63/128
06/05/24	06/07/24	61/61
07/31/24	08/09/24	61/183
07/24/25	08/05/25	64/137
12/30/10	01/02/11	32/56
07/31/24	08/09/24	54/599
08/08/24	08/16/24	61/208
09/10/24	09/17/24	54/616
06/04/24	06/07/24	61/69
07/08/24	07/12/24	61/143
03/31/24	04/02/24	60/243
03/29/24	04/02/24	60/244
03/19/09	01/07/10	29/773-76
03/19/09	01/07/10	29/776-78
05/11/00	06/13/00	19/621-33
05/10/32	06/01/32	74/540
12/19/27	12/21/27	65/303
19/01/25	12/05/25	65/48
05/01/69	12/22/69	397/361

09/04/68	09/19/68	381/379
06/29/70	06/30/70	404/23
09/07/71	09/07/71	425/37
08/10/71	12/30/71	430/506
04/27/64		342/415
08/01/63	08/02/63	314/392

The following properties were transferred by Crescent Land and Timber Corporation (Crescent) to various grantees between July 1, 1972, and July 2, 1974:

Date of Deed	*Recordation Date*	*Book/Page*
03/05/73	03/09/73	458/232
12/11/73	02/28/74	479/347
05/28/74	07/04/74	486/113
02/01/73	02/02/73	456/60
12/11/73	01/28/74	477/575

2. C.H. Albright — One, E, (861)
Deed dated 1/21/79;
Deed Book 589, page 536

3. T.W. Hutchison — Three, K, ¶24 (980)
Tax Map Number 548-00-00-038

III, n.5

Appendix E

The judgment of the district court is VACATED and the cause REMANDED for further action not inconsistent with section IV.C. of this opinion as to the following parcels.

	Defendant	*Parcel*	*Section of this Opinion Rejecting Other Challenges to Listed Parcel*[5]
1.	Bowater Corp.	Three, V, (996) ¶8 (278 acres +-, conveyed to East Highlands Co. by deed recorded in York County Deed Book 394 at page 281)	III

Appendix F

The judgment of the district court is VACATED and the cause REMANDED for further action not inconsistent with section IV.D. of this opinion as to the following parcels.

	Defendant	*Parcel*	*Section of this Opinion Rejecting Other Challenges to Listed Parcel*[6]
1.	John M. Spratt, Jr.	One, V, Tract No. 6 (926) (Tax Map No. 661-2)	III, n.5

Appendix G

The judgment of the district court is VACATED and the cause REMANDED for further action not inconsistent with footnote 7 of this opinion as to the following parcels.

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[5] See *supra* Appendix C n.3.

[6] See *supra* Appendix C n.3.

	Defendant	*Parcel*	*Section of this Opinion Rejecting Other Challenges to Listed Parcel*[7]
1.	Close Family	Three, Y, (1004), parcel with Southern Appliances, Inc. as grantor, recorded in deed book 418 at page 382, dated 5/12/71.	II (sp.pc.) III
		Three, Y, (1004), parcel with Paul Gibson as grantor, recorded in deed book 481 at page 65, dated 3/21/74.	II (sp. pc.) III
		Three, Y, (1006), parcels identified by tax map numbers:	
		710 0000 003	II (sp. pc.) III
		732 0000 003	II (sp. pc.) III
		730 0000 009	II (sp. pc.) III

[7] See *supra* Appendix C n.3.

	. 731 0000 002	II (sp. pc.) III
	710 0000 004	II (sp.pc.) III

The judgment of district court is VACATED pursuant to footnote 7 of this opinion as to the following parcel.

1.	Close Family	Three, Y, (1004), parcel with Curt Siefart as grantor, recorded in deed book 448 at page 38, dated 9/20/72.	II (sp. pc.) III

Appendix H

The judgment of the district court is REVERSED and the cause REMANDED for further action not inconsistent with section VIII of this opinion. The following defendants were erroneously dismissed in that they claim certain parcels not released by the judgment orders.

	Defendant	*Parcels Remaining in this Case*[8]
1.	J. Max Hinson	J.A. 641, Exhibit A, Tract numbers 27,29
2.	William O. Nisbet	J.A. 778, 53 acre tract

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[8] Of course, because summary jugment [sic] was not granted as to these parcels they do not appear in the district court's judgment orders. Accordingly, we refer to these parcels by their description in the materials supporting the respective defendant's motion for summary judgment. Each reference is to Joint Appendix page number and paragraph or tract number or description, as appropriate.

3.	Ashe Farms	J.A. 494 ¶2 J.A. 776 ¶¶5 through 8 J.A. 777 ¶2
4.	C.H. Albright	J.A. 731 ¶7

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC., Plaintiff v. STATE OF SOUTH CAROLINA, et al., Defendants.	C. A. No. 80-2050 FILED JUL 18 1990

JUDGMENT ORDER

This matter coming on to be heard on the application of a number of the named defendants for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure as to certain parcels of land claimed to have been adversely held for ten years without tacking except by inheritance, between July 1, 1962 and October 20, 1980; and, therefore;

The Court, having considered the affidavits, answers to interrogatories and the memoranda filed herein and the arguments of counsel, hereby determines:

1. This Court on April 17, 1990 entered an order making the following determinations of law with respect to the application of S.C. Code §§ 15-3-340 and 15-67-210 to the claims of the plaintiff to the parcels as to which the named defendants have moved for summary judgment:

a. Possession by a defendant (or his predecessor) under a belief of ownership does not preclude a

finding of the requisite hostility to constitute adverse possession pursuant to the statutes of limitation.

b. A defendant whose uncontroverted affidavit states or shows that he (or his predecessor) has continuously occupied or possessed the property for ten years (without tacking except by inheritance), has treated the property as his own, paid taxes thereon, maintained the property and taken steps to protect it against trespassers or others who might seek to use it or assert any claim to it, has demonstrated adverse possession of the property.

c. A defendant whose uncontroverted affidavit states or shows that he (or his predecessor) continuously occupied or possessed property pursuant to color of title for ten years (without tacking except by inheritance) has demonstrated adverse possession of the property.

d. The non-residence of a defendant claiming adverse possession does not toll the statutory period.

e. The adverse possession of one co-tenant establishes the adverse possession of his co-tenants.

f. A devise to an heir of a testator does not interrupt possession.

g. A change in the identity of a trustee or agent does not interrupt possession.

h. The deeding out of a parcel during the period of adverse possession does not interrupt the possession of the portion not deeded out.

2. Pursuant to said order of April 17, 1990, the counsel for plaintiff and defendants were directed to

confer concerning the application of the legal determinations set forth in paragraph 1 hereof and identified the parcels to which the plaintiff's claims are barred, assuming application of said legal determinations; said identification to be without prejudice to the right of any party on appeal to raise the validity of said legal determinations.

3. The counsel of plaintiff and defendants have so met and determined that applying said legal determinations and the affidavits on file herein, there is no controversy as to the parcels set forth in paragraph 5 of this order.

4. The Court has also determined from answers to interrogatories on file herein that certain of the named defendants are entitled to have the plaintiff's claims dismissed as to all of their parcels in the claim area and that, therefore, such named defendants should be dismissed as parties herein.

5. The parcels as to which there is no controversy and the owners of said parcels are as follows:

a. The real estate of the defendant Celanese Corporation of America, now known as Hoechst Celanese Corporation, as described in Exhibit A hereto, this being all the property owned by this defendant within the claim area.

b. Real Estate of Wachovia Bank and Trust Company held as trustee, as described in Exhibit B hereto.

c. Real Estate of Heritage Village Church & Missionary Fellowship, Inc. (referred to in Caption as

Church Heritage Village & Missionary Fellowship), as described in Exhibit C hereto.

d. Real Estate of Defendant Herald Publishing Company, as described in Exhibit D hereto.

e. Real Estate of Defendant C.H. Albright, as described in Exhibit E hereto.

f. Real Estate of Defendant Ned M. Albright (referred to in Caption as Ned Albright), as described in Exhibit F hereto.

g. Real Estate of Defendant David Goode Anderson, as described in Exhibit G hereto.

h. Real Estate of Defendant John Wesley Anderson, III, as described in Exhibit H hereto.

i. Real Estate of Defendant F.S. Barnes, Jr. as described in Exhibit I hereto.

j. Real Estate of Defendant T.W. Hutchison, as described in Exhibit J hereto.

k. Real Estate of Defendant Francis M. Mack, Jr. (referred to in Caption as F.M. Mack, Jr.), as described in Exhibit K hereto.

l. Real Estate of Defendant John S. Simpson, as described in Exhibit L hereto.

m. Real Estate of Defendant Thomas Brown Snodgrass, Jr., as described in Exhibit M hereto, this being all property owned by this defendant within the claim area.

n. Real Estate of Defendant Marshall E. Walker, as described in Exhibit N hereto.

o. Real Estate of Defendant City of Rock Hill, South Carolina, as described in Exhibit O hereto.

p. Real Estate of Defendant Duke Power Company, as described in Exhibit P hereto.

q. Real Estate of Defendant Crescent Resources, Inc. (referred to in Caption as Crescent Land & Timber Corp.), as described in Exhibit Q hereto.

r. Real Estate of Defendant State of South Carolina, as described in Exhibit R hereto.

s. Real Estate of Defendant Southern Railway Company, as described in Exhibit S hereto.

t. Real Estate of Defendant Bowater, Inc. (referred to in Caption as Bowater Carolina Corporation), as described in Exhibit T hereto.

u. Real Estate of Defendant Elizabeth Nisbet Martin (referred to in Caption as E.N. Martin), Mary Nisbet Purvis, Eugenia Nisbet White, Rebecca Nisbet Rencher (referred to in Caption as R.N. Bencher), Jane Nisbet Goode, and W. Olin Nisbet, III. (referred to in Caption as W.O. Nisbet, III), as described in Exhibit U hereto, this being all the property owned by these defendants within the claim area.

v. Real Estate of Defendant John M. Spratt, Jr., as described in Exhibit V hereto, this being all the property owned by this defendant within the claim area.

w. Real Estate of Defendant Hiram Hutchison, as described in Exhibit W hereto.

x. Real Estate of Defendant J. Max Hinson, as described in Exhibit X hereto.

y. Real Estate of Defendant Arnold F. Marshall, as described in Exhibit Y hereto.

6. A copy of this Judgment Order shall be recorded in the office of the Clerk of the Court or Register of Mesne Conveyances of the counties where the real estate is situated and indexed in judgment book under the name of the defendants and in the book of deeds with the plaintiff being the grantor and the defendants being the grantees.

NOW, THEREFORE, the Court hereby finds, orders and decrees as follows:

I. Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is hereby granted that the plaintiff, or anyone claiming by or on its behalf, has no claim of any kind as to the real estate described in paragraph 5 hereof, and final judgment is hereby entered dismissing with prejudice the complaint as to each of said parcels.

II. Final judgment is hereby entered dismissing the complaint with prejudice as to each of the following named defendants:

a. Celanese Corporation, now known as Hoechst Celanese Corporation;

b. Jane Nisbet Goode; Rebecca Nisbet Rencher (referred to in Caption as R.N. Bencher); W. Olin Nisbet, III (referred to in Caption as W.O. Nisbet); Elizabeth Nisbet Martin (referred to in Caption as E.N. Martin), Mary Nisbet Purvis, and Eugenia Nisbet White.

c. Thomas Brown Snodgrass, Jr.

d. John M. Spratt, Jr.

III. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court directs entry of final judgments as to the judgments granted in paragraphs I and II of this order, and the Court finds that there is no just reason for delay.

Dated this 18th day of July, 1990.

/s/ Joseph P. Willson
Joseph P. Willson
Senior District Judge
Sitting by Special Designation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC.,	)	C.A. No. 80-2050
Plaintiff	)	FILED JUL 18 1990)
v.	)	
STATE OF SOUTH CAROLINA, et al.,	)	
Defendants.	)	

SECOND JUDGMENT ORDER

(DUKE POWER COMPANY AND CRESCENT RESOURCES, INC.)

This matter coming on to be heard on the application of a number of the named defendants for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure as to certain parcels of land claimed to have been adversely held for ten years without tacking except by inheritance, between July 1, 1962 and October 20, 1980; and, therefore;

The Court, having considered the affidavits, answers to interrogatories and the memoranda filed herein and the arguments of counsel, hereby determines:

1. This Court on April 17, 1990 entered an order making the following determinations of law with respect to the application of S.C. Code §§ 15-3-340 and 15-67-210 to the claims of the plaintiff to the parcels as to which the named defendants have moved for summary judgment:

a. Possession by a defendant (or his predecessor) under a belief of ownership does not preclude a finding of the requisite hostility to constitute adverse possession pursuant to the statutes of limitation.

b. A defendant whose uncontroverted affidavit states or shows that he (or his predecessor) has continuously occupied or possessed the property for ten years (without tacking except by inheritance), has treated the property as his own, paid taxes thereof, maintained the property and taken steps to protect it against trespassers or others who might seek to use it or assert any claim to it, has demonstrated adverse possession of the property.

c. A defendant whose uncontroverted affidavit states or shows that he (or his predecessor) continuously occupied or possessed property pursuant to color of title for ten years (without tacking except by inheritance) has demonstrated adverse possession of the property.

d. The non-residence of a defendant claiming adverse possession does not toll the statutory period.

e. The adverse possession of one co-tenant establishes the adverse possession of his co-tenants.

f. A devise to an heir of a testator does not interrupt possession.

g. A change in the identity of a trustee or agent does not interrupt possession.

h. The deeding out of a parcel during the period of adverse possession does not interrupt the possession of the portion not deeded out.

2. This judgment order supplements, but does not modify, the Court's previous judgment order which covered parcels which the plaintiff agreed met the requirements of summary judgment as set forth by this Court on April 17, 1990.

3. Duke Power Company (Duke) and Crescent Resources, Inc., formerly known as Crescent Land and Timber Corporation, (Crescent), filed a Memorandum dated May 15, 1990, which addressed the Plaintiff's contentions as to the Duke "Lake Wylie Perimeter Property," the Crescent "Carowinds Property," and two transmission line tracts owned by Duke known as the "Scott tract" and the "Hinson tract". In addition, certain defendants (including Duke and Crescent) filed a supplemental memorandum in support of summary judgment for parcels which the plaintiff did not agree met the requirements for summary judgment as set forth by this Court on April 17, 1990 (Memorandum in Support of Parcels Remaining in Dispute, filed July 10, 1990).

4. The Court, having reviewed the defendants' memoranda and any opposition thereto, and the affidavits filed in support of summary judgment, hereby orders that the complaint is dismissed with prejudice as to the property described in the instruments listed on Exhibits A, B, and D, and reflected on the map which is Exhibit C, attached hereto and incorporated herein by reference.

5. In the above-referenced affidavits and memoranda, Duke and Crescent raised certain legal issues not covered by the April 17, 1990 Order. Because Duke and

Crescent have shown certain uncontroverted facts, taken as true, the Court finds as a matter of law that:

(a) The deed of paper title from Duke to Crescent, its wholly owned subsidiary, which is a mere alter ego or instrumentality of Duke, did not interrupt continuous possession by Duke for the ten year period necessary to establish adverse possession, and therefore, Duke's adverse possession as to the properties listed on Exhibit A hereto (Lake Wylie Perimeter Property) and held by Duke from July 2, 1964, to July 2, 1974, is not defeated;

(b) As to the five parcels listed on Exhibit A as properties transferred by Crescent between July 1, 1972, and July 2, 1974, the merger between Duke Power Company of North Carolina and Duke Power Company of New Jersey did not interrupt the ten year holding period, and therefore does not defeat Duke's adverse possession of said properties;

(c) As to the Carowinds property listed on Exhibit B hereto, and reflected on the map attached hereto as Exhibit C, the merger of Crescent and the Carowinds Corporation did not interrupt the ten year holding period, and therefore does not defeat Crescent's adverse possession of said properties;

(d) The Plaintiff's contentions that the transfer of paper title from Duke to Crescent on May 1, 1969, violated FPC Order 313 are without merit, and the Plaintiff has failed to establish that the transfer was invalid or illegal;

(e) In addition to its arguments in regard to adverse possession, Duke is a public utility with the power of eminent domain, and because the Plaintiff failed to file an action for inverse condemnation prior to the expiration of the six year statute of limitations, the Plaintiff is barred from its claim to the Scott tract and the Hinson tract listed on Exhibit D; and

(f) The condemnation authority conferred by Section 21 of the Federal Power Act, 16 U.S.C. § 791 (a), *et seq.* extends to Indian lands. Since Duke did not acquire its lands by purchase as against the Plaintiff, the lands were acquired pursuant to eminent domain by the physical possession of the lands by Duke. Therefore, the Plaintiff was required to assert its claim against Duke within six years after July 1, 1962, and the Plaintiff is barred from its claim to the Scott tract and the Hinson tract listed on Exhibit D. *State of S. C., et al. v. Catawba Indian Tribe,* 476 U. S. 498 (1986).

6. The properties of Duke and Crescent as to which the complaint is dismissed in this Order are those properties described in the instruments listed on Exhibits A, B, and D, and reflected on the map which is Exhibit C, attached hereto.

7. A copy of this Order shall be recorded in the office of the Clerk of Court or Register of Mesne Conveyances of the counties where the real estate is situated and indexed in judgment book under the name of the defendants and in the book of deeds with the plaintiff being the grantor and the defendants being the grantees.

NOW, THEREFORE, the Court hereby finds, orders and decrees as follows:

I. Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is hereby granted that the plaintiff, or anyone claiming by or on its behalf, has no claim of any kind as to the real estate described in paragraph 6 hereof, and final judgment is hereby entered dismissing with prejudice the complaint as to each of said parcels.

II. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court directs entry of final judgments as to the judgments granted in paragraph I of this Order, and the Court finds that there is no just reason for delay.

Dated this 18th day of July, 1990.

/s/ Joseph P. Willson
Joseph P. Willson
Senior District Judge
Sitting by Special
Designation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC.,	)	C. A. No. 80-2050
Plaintiff	)	FILED JUL 18 1990
v.	)	
STATE OF SOUTH CAROLINA, et al.,	)	
Defendants.	)	

THIRD JUDGMENT ORDER

This matter coming on to be heard on the application of a number of the named defendants for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure as to certain parcels of land claimed to have been adversely held for ten years without tacking except by inheritance, between July 1, 1962 and October 20, 1980; and, therefore;

The Court, having considered the affidavits, answers to interrogatories and the memoranda filed herein and the arguments of counsel, hereby determines:

1. This Court on April 17, 1990 entered an order making the following determinations of law with respect to the application of S.C. Code §§ 15-3-340 and 15-67-210 to the claims of the plaintiff to the parcels as to which the named defendants have moved for summary judgment:

a. Possession by a defendant (or his predecessor) under a belief of ownership does not preclude a

finding of the requisite hostility to constitute adverse possession pursuant to the statutes of limitations.

b. A defendant whose uncontroverted affidavit states or shows that he (or his predecessor) has continuously occupied or possessed the property for ten years (without tacking except by inheritance), has treated the property as his own, paid taxes thereon, maintained the property and taken steps to protect it against trespassers or others who might seek to use it or assert any claim to it, has demonstrated adverse possession of the property.

c. A defendant whose uncontroverted affidavit states or shows that he (or his predecessor) continuously occupied or possessed property pursuant to color of title for ten years (without tacking except by inheritance) has demonstrated adverse possession of the property.

d. The non-residence of a defendant claiming adverse possession does not toll the statutory period.

e. The adverse possession of one co-tenant establishes the adverse possession of his co-tenants.

f. A devise to an heir of a testator does not interrupt possession.

g. A change in the identity of a trustee or agent does not interrupt possession.

h. The deeding out of a parcel during the period of adverse possession does not interrupt the possession of the portion not deeded out.

2. This judgment order supplements, but does not modify, the Court's previous judgment order which covered parcels which the plaintiff agreed met the requirements for summary judgment as set forth by this Court on April 17, 1990.

3. Defendants filed a supplemental memorandum in support of parcels which the plaintiff did not agree met the requirements for summary judgment as set forth by this Court on April 17, 1990 (Memorandum in Support of Parcels Remaining in Dispute, filed July 10, 1990). The Court, having reviewed the defendants' memorandum and any opposition thereto, and the affidavits filed in support of summary judgment, hereby orders that the complaint is dismissed with prejudice as to the parcels described in paragraph 6 herein.

4. In their supplemental memorandum defendants raised certain legal issues not covered by the April 17, 1990 Order. The Court today makes the following additional rulings:

a. Mortgage documents are writings sufficient to constitute color of title for purposes of establishing adverse possession.

b. Timber growing or farming is sufficient occupation or possession of the property to establish adverse possession.

c. A deed to a husband serves as color of title for his wife if their marriage took place while Dower rights still attached to all lands of which a husband was seized during coverture.

d. Adverse possession is not interrupted by entry of the owner unless there is also ouster of the claimant.

5. The Court has also determined from answers to interrogatories on file herein that certain of the named defendants are entitled to have the plaintiff's claims dismissed as to all of their parcels in the claim area and that, therefore, such named defendants should be dismissed as parties herein.

6. The parcels as to which the complaint is dismissed in this order are:

a. Real Estate of Wachovia Bank and Trust Company held as trustee, as described in Exhibit A hereto.

b. Real Estate of Heritage Village Church & Missionary Fellowship, Inc. (referred to in Caption as Church Heritage Village & Missionary Fellowship), as described in Exhibit B hereto.

c. Real Estate of Defendant Herald Publishing Company, as described in Exhibit C hereto.

d. Real Estate of Defendant C.H. Albright, as described in Exhibit D hereto.

e. Real Estate of Defendant Ned M. Albright (referred to in Caption as Ned Albright), as described in Exhibit E hereto.

f. Real Estate of Defendant Ashe Brick Co. (Ashe Farms), as described in Exhibit F hereto.

g. Real Estate of Defendant David Goode Anderson, as described in Exhibit G hereto.

h. Real Estate of Defendant Hugh White, as described in Exhibit H hereto.

i. Real Estate of Defendant John Wesley Anderson, III, as described in Exhibit I hereto.

j. Real Estate of Defendant F.S. Barnes, Jr. as described in Exhibit J hereto.

k. Real Estate of Defendant T.W. Hutchison, as described in Exhibit K hereto.

l. Real Estate of Defendant Robert A. Fewell, as described in Exhibit L hereto.

m. Real Estate of Defendant Francis M. Mack, Jr. (referred to in Caption as F.M. Mack, Jr.), as described in Exhibit M hereto.

n. Real Estate of Defendant John S. Simpson, as described in Exhibit N hereto.

o. Real Estate of Defendant Robert T. Simpson, as described in Exhibit O hereto.

p. Real Estate of Defendant Marshall E. Walker, as described in Exhibit P hereto.

q. Real Estate of Defendant City of Rock Hill, South Carolina, as described in Exhibit Q hereto.

r. Real Estate of Defendant Elizabeth Ardrey Grimball, as described in Exhibit R hereto.

s. Real Estate of Defendant John M. Belk, as described in Exhibit S hereto.

t. Real Estate of Defendant Annie Harris, as described in Exhibit T hereto.

u. Real Estate of Defendant William O. Nisbet, as described in Exhibit U hereto.

v. Real Estate of Defendant Bowater, Inc. (referred to in Caption as Bowater Carolina Corporation), as described in Exhibit V hereto.

w. Real Estate of Defendant J. Max Hinson, as described in Exhibit W hereto.

x. Real Estate of Defendant Springs Mills, as described in Exhibit X hereto.

y. Real Estate of Defendants comprising the Close Family, as described in Exhibit Y hereto.

z. Real Estate of Defendant Archie B. Carroll, as described in Exhibit Z hereto.

aa. Real Estate of Defendant W.R. Simpson, as described in Exhibit AA hereto.

bb. Real Estate of Defendant Citizens & Southern National Bank, as described in Exhibit BB hereto.

cc. Real Estate of Defendant Mary A. and W.T. McCorkle, as described in Exhibit CC hereto.

7. A copy of this Order shall be recorded in the Office of the Clerk of the Court or Register of Mesne Conveyances of the counties where the real estate is situated and indexed in judgment book under the name of the defendants and in the book of deeds with the plaintiff being the grantor and the defendants being the grantees.

NOW, THEREFORE, the Court hereby finds, orders and decrees as follows:

I. Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is hereby granted that the plaintiff, or anyone claiming by or on its behalf, has no claim of any kind as to the real estate described in paragraph 6 hereof, and final judgment is hereby entered dismissing with prejudice the complaint as to each of said parcels.

II. Final judgment is hereby entered dismissing the complaint with prejudice as to each of the following named defendants:

1. J. Max Hinson
2. Wachovia Bank & Trust Company
3. C.H. Albright
4. Ashe Brick Co.
5. Hugh White
6. John Wesley Anderson, III
7. F.S. Barnes, Jr.
8. T.W. Hutchison
9. Robert A. Fewell
10. F.M. Mack, Jr. (Francis M. Mack, Jr.)
11. John S. Simpson
12. Robert T. Simpson
13. Marshall E. Walker
14. John M. Belk
15. Annie Harris
16. William O. Nisbet
17. Archie B. Carroll
19. W.R. Simpson
20. Mary A. and W.T. McCorkle

III. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court directs entry of final judgments as to the judgments granted in paragraphs I and II

of this order, and the Court finds that there is no just reason for delay.

Dated this 18 day of July, 1990.

/s/ Joseph P. Willson
Joseph P. Willson
Senior District Judge
Sitting by Special
Designation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC., Plaintiff v. STATE OF SOUTH CAROLINA, et al., Defendants.	C.A. No. 80-2050 FILED AUG 10 1990

AMENDMENT TO SECOND JUDGMENT ORDER
(DUKE POWER COMPANY AND
CRESCENT RESOURCES, INC.)

Defendants Duke Power Company (Duke) and Crescent Resources, Inc. (Crescent) have moved pursuant to Rule 59(e), F.R.C.P. to amend the Second Judgment Order entered in the above case under date of July 18, 1990, filed July 19, 1990 so as to correct an error in Paragraph 5(f) of said Order, wherein the property intended to be identified was mistakenly referred to as "the Scott Tract and the Hinson Tract," which tracts were part of Duke's Transmission Line property and were described in Exhibit D to said Order. The properties intended to be identified therein were Duke's "Lake Wylie Dam Property," described on Exhibit A to this Amendment to Second Judgment Order, and "Lake Wylie Basin Property," described on Exhibit B to this Amendment to Second Judgment Order, and are among the properties as to which Summary Judgment was granted in the First Judgment Order entered in the above case under date of July 18, 1990, filed July 19, 1990.

It appears that the Federal Power Act does not apply to transmission lines, and therefore, the Scott and Hinson tracts are not proper subjects for summary judgment under Paragraph 5 (f) of the Second Judgment Order. On the other hand, the Federal Power Act does apply to the Lake Wylie Dam Property and the Lake Wylie Basin Property by virtue of the license issued to Duke in 1958 by the Federal Energy Regulatory Commission, as evidenced by the Affidavit of John E. Lansche dated May 15, 1990 and filed in this proceeding. By the terms of this Amendment to Second Judgment Order, summary judgment will be granted as to the Lake Wylie Dam and Basin Properties on the additional grounds asserted in substituted Paragraph 5(f).

Now, therefore, it is hereby ordered that page 5 of the Second Judgment Order heretofore entered under date of July 18, 1990 is amended by deletion therefrom of the subparagraph formerly designated as subparagraph (f) of Paragraph 5, and in lieu thereof, the following subparagraph is substituted:

(f) The condemnation authority conferred by Section 21 of the Federal Power Act, 16 U.S.C. § 791 (a), *et seq.* extends to Indian lands. The license issued to Duke in 1958 by the Federal Energy Regulatory Commission for the Catawba/Wateree Hydroelectric Project included the Lake Wylie Dam Property and the Lake Wylie Basin Property. Since Duke did not acquire its lands by purchase as against the Plaintiff, the lands were acquired pursuant to eminent domain by the physical possession of the lands by Duke. Therefore, the Plaintiff was required to assert its claim against Duke within six years after the issuance of Duke's Federal license in 1958, or in

the alternative, within six years after July 1, 1962, and the Plaintiff is barred from its claim to the "Lake Wylie Dam Property" listed on Exhibit A to this Amendment to Second Judgment Order and the "Lake Wylie Basin Property" listed on Exhibit B to this Amendment to Second Judgment Order. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U. S. 99, 80 S.Ct. 543 (1960); *State of S.C., et al. v. Catawba Indian Tribe*, 476 U. S. 498 (1986)

Except as herein modified, the Second Judgment Order dated July 18, 1990, filed July 1990 remains in full force and effect.

A copy of this Amendment to Second Judgment Order shall be recorded in the office of the Clerk of Court for York County, South Carolina and indexed in the judgment book under the name of the Defendant Duke Power Company and in the book of deeds with the Plaintiff being the grantor and the Defendant Duke Power Company being the grantee.

Dated this 4th day of August, 1990.

/s/ Joseph P. Willson
Joseph P. Willson
Senior District Judge
Sitting by Special
Designation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC., Plaintiff, v. STATE OF SOUTH CAROLINA, et al., Defendants.	)	C.A. No. 80-2050 FILED DEC 21 1990

FOURTH JUDGMENT ORDER

This matter was heard on July 18, 1990 on the application of Springs Industries, Inc., ("Springs") among other named defendants, for summary judgment pursuant to Fed.R.Civ.P. 56 as to certain parcels of land which Springs claims to have adversely held for ten years, without tacking except by inheritance, between July 1, 1962 and October 20, 1980. Summary judgment in favor of certain defendants was entered on July 19, 1990 pursuant to this Court's First, Second and Third Judgment Orders, as to certain parcels of land, including lands claimed by Springs;

NOW, THEREFORE, in accordance with the rules and principles of law enunciated in the above three July 19, 1990 Judgment Orders, and as more specifically set out below, this Court, having considered the Affidavits, Answers to Interrogatories, Memoranda and arguments of counsel for Springs, hereby determines:

1. That this Court, on April 17, 1990 entered an order making the following determinations of law with

respect to the application of *S.C. Code Ann.* §§ 15-3-340 and 15-67-210 (1976) to the claims of the plaintiff to the parcels as to which Springs hereby moves for summary judgment:

(a) Possession by a defendant (or his predecessor) under a belief of ownership does not preclude a finding of the requisite hostility to constitute adverse possession pursuant to the statutes of limitation.

(b) A defendant whose uncontroverted affidavit states or shows that he (or his predecessor) has continuously occupied or possessed the property for ten years (without tacking except by inheritance), has treated the property as his own, paid taxes thereon, maintained the property and taken steps to protect it against trespassers or others who might seek to use it or assert any claim to it, has demonstrated adverse possession of the property.

(c) A defendant whose uncontroverted affidavit states or shows that he (or his predecessor) continuously occupied or possessed property pursuant to color of title for ten years (without tacking except by inheritance) has demonstrated adverse possession of the property.

(d) The non-residence of a defendant claiming adverse possession does not toll the statutory period.

(e) The adverse possession of one co-tenant establishes the adverse possession of his co-tenants.

(f) A devise to an heir of a testator does not interrupt possession.

(g) A change in the identity of a trustee or agent does not interrupt possession.

(h) The deeding out of a parcel during the period of adverse possession does not interrupt the possession of the portion not deeded out.

2. This judgment order supplements, but does not modify, the Court's previous judgment orders which covered parcels which the plaintiff agreed met the requirements for summary judgment as set forth by this Court on April 17, 1990.

3. In their Supplemental Memorandum filed prior to the July 18, 1990 hearing defendants, including Springs, raised certain legal issues not covered by the April 17, 1990 Order. The Court ruled in its July 19, 1990 Order, and today reaffirms, the following:

(a) Mortgage documents are writings sufficient to constitute color of title for purposes of establishing adverse possession.

(b) Timber growing or farming is sufficient occupation or possession of the property to establish adverse possession.

(c) A deed to a husband serves as color of title for his wife if their marriage took place while Dower rights still attached to all lands of which a husband was seized during coverture.

(d) Adverse possession is not interrupted by entry of the owner unless there is also ouster of the claimant.

4. Defendants, including Springs, have filed a Supplemental Memorandum in support of their claims to parcels which the plaintiff did not agree met the requirements for summary judgment as set forth by this Court on April 17, 1990 (Memorandum in Support of Parcels

Remaining in Dispute, filed July 10, 1990). The Court, having reviewed this memorandum, and any opposition thereto, and the affidavits filed in support of summary judgment, hereby orders that the complaint is dismissed with prejudice as to the parcels described in Exhibit A, *attached* to this order and incorporated by reference.

5. A copy of this Order shall be recorded in the Office of the Clerk of the Court of York County and indexed in the judgment books under the name of Springs Industries, Inc. and in the book of deeds with the plaintiff being the grantor and the defendant Springs Industries, Inc. being the grantee.

NOW, THEREFORE, the Court finds, orders and decrees as follows:

I. Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is hereby granted that the plaintiff, or anyone claiming by or on its behalf, has no claim of any kind as to the real estate described in Exhibit A, attached, and final judgment is entered dismissing with prejudice the complaint as to each of said parcels.

II. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court directs entry of final judgment pursuant to this Order, and the Court finds that there is no just reason for delay.

Dated this 17 day of December, 1990.

/s/ Joseph P. Willson
Joseph P. Willson
Senior District Judge
Sitting by Special Designation

APPENDIX C

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, also known as the Catawba Nation of South Carolina, Appellant,

v.

STATE OF SOUTH CAROLINA, et al., Appellees.

No. 82-1671.

United States Court of Appeals,
Fourth Circuit.

Argued April 6, 1988.

Decided Jan. 23, 1989.

Jerry Jay Bender (H. Clayton Walker, Jr., Jean H. Toal, Belser, Baker, Barwick, Ravenel, Toal & Bender, Columbia, S.C., Don B. Miller, Native American Rights Fund, Boulder, Colo., Robert M. Jones, Richard Steele, on brief), for appellant.

J.D. Todd, Jr. (Michael J. Giese, Gwendolyn Embler, Leatherwood, Walker, Todd & Mann, Greenville, S.C., John C. Christie, Jr., J. William Hayton, Patrick J. Roach, Janet F. Satterwhite, Brian A. Runkel, Bell, Boyd & Lloyd, Washington, D.C., Dan M. Byrd, Jr., Mitchell K. Byrd, Byrd & Byrd, Rockhill, S.C., T. Travis Medlock, Atty. Gen., Kenneth P. Woodington, Asst. Atty. Gen., James D. St. Clair, P.C., James L. Quarles, III, William F. Lee, Daniel Solomon, Hale & Dorr, Boston, Mass., on brief), for appellees.

Before WIDENER, HALL PHILLIPS, MURNAGHAN and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

The Supreme Court remanded this case for us to determine whether the claim of the Catawba Indian Tribe to a tract of land is barred by South Carolina statutes of limitations. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986). We hold that the statutes of limitations pertaining to disabled persons, sections 15-3-370 and 15-3-40 of the Code of South Carolina, do not bar the tribe from maintaining this action. We also hold that sections 15-3-340 and 15-67-210 bar the tribe from recovering possession and damages from a person who holds and possesses property that has been held and possessed adversely to the tribe's legal title for ten years after the revocation of the tribe's constitution, July 1, 1962, and before the commencement of this action, October 20, 1980, without tacking except by inheritance. We also hold that the statutes of limitations do not bar the tribe from recovering possession and damages from other persons. We therefore affirm in part and reverse in part the district court's grant of summary judgment in favor of the state and all persons in possession and remand the case for further proceedings on the issues remaining to be tried.

I

The facts that we assume for the purpose of summary judgment are recounted in the majority and dissenting opinions of the Supreme Court[1] and need only be summarized here. In the 1760 Treaty of Pine Hill and the 1763

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[1] *See South Carolina v. Catawba Indian Tribe*, 476 U.S. at 500-05 and 511-18, 106 S.Ct. at 2041-43 and 2046-50 (Blackmun,

Treaty of Augusta, the tribe agreed with representatives of the King of England to relinquish its aboriginal territory in exchange for permanent resettlement on a fifteen square mile tract in South Carolina. In the 1840 Treaty of Nation Ford, the tribe transferred its interest in the tract to South Carolina. The United States did not participate in the Treaty of Nation Ford.

In 1959, Congress passed the Catawba Act, 73 Stat. 592, 25 U.S.C. §§ 931-38 (1976), which ultimately led to the revocation of the tribe's constitution on July 1, 1962. As of that date, the tribe's claim to the land it relinquished in 1840 became subject to South Carolina statutes of limitations.

In 1980, the tribe brought suit to recover possession of its land and damages. It asserts that the 1840 Treaty of Nation Ford was void because the United States did not participate in it or consent to the alienation of the tribe's reservation as required by the Indian Nonintercourse Act.[2]

II

The state argues that the tribe was a disabled plaintiff within the meaning of sections 15-3-370 and 15-3-40 from

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J., dissenting).

[2] 25 U.S.C. § 177 (1976) (originally enacted as Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138). The Act states in relevant part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

1840 to 1962, when Congress passed the Catawba Act. Therefore, the state asserts, the tribe had no longer than ten years after 1962, when its disability was lifted, to bring suit. According to the state, since the tribe did not file suit within this period, the statute of limitations bars its claim.[3]

Section 15-3-370 on which the state primarily relies provides:

> Persons under disability.
>
> If a person entitled to commence any action for the recovery of real property, or make an entry or defense founded on the title to real property or to rents or services out of the same be, at the time such title shall first descend or accrue, either:
>
> (1) Within the age of eighteen years;
>
> (2) Insane; or
>
> (3) Imprisoned on a criminal or civil charge or in execution upon conviction of a criminal offense for a term less than life;
>
> The time during which such disability shall continue shall not be deemed any portion of the time in this article limited for the commencement of such action or the making of such entry or defense, but such action may be commenced or entry or defense made after the period of ten years and within ten years after the disability shall cease or after the death of the person entitled who shall die under such disability. But

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[3] For convenience we refer to all defendants collectively as the state.

> such action shall not be commenced or entry or defense made after that period.

Section 15-3-40 recognizes identical disabilities for other causes of action.

The state's position cannot be reconciled with section 15-3-370. The statute applies to only three classes of plaintiffs: infants, the insane, and persons imprisoned for less than their natural lives. Nothing in the statute creates a fourth class of plaintiffs in the tribe's position. Application of the statute obliges us to ascertain the legislature's intent. We cannot read something into the statute that the legislature did not contemplate. Quoting its precedents, the South Carolina Supreme Court has emphasized:

> [C]ourts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws.

Belk v. Nationwide Mutual Insurance Company, 271 S.C. 24, 27, 244 S.E.2d 744, 746 (1978). We conclude that the Supreme Court of South Carolina would not construe sections 15-3-370 and 15-3-40 to include Indians in the legislatively defined class of disabled persons. Therefore

we hold that the disability statutes do not bar the tribe's claim.

III

Section 15-3-340 provides that no action for the recovery of possession of real property shall be brought unless the plaintiff or his predecessor was seized or possessed of the premises within 10 years before the commencement of the action. Section 15-67-210 creates a presumption of possession if the plaintiff establishes legal title.[4] The tribe acknowledges that it has not been in possession of the tract since 1840, but it maintains that it has Indian title to the tract and that Indian title is legal title within the meaning of section 15-67-210. Therefore, the tribe claims that it is entitled to the presumption of possession prescribed in section 15-67-210 and that the state cannot defeat its claim on the basis of the statute of limitations. The state argues that the tribe is not entitled to the presumption because Indian title is not legal title and that the presumption is inapplicable because the tribe admits it has been out of possession since 1840.

Indian title is a creation of federal law. It is the title given to land occupied by Indians when the United States gained its independence from Great Britain and became the sovereign. Indian title includes a right to possession superior to that incident to fee simple title; where Indian title and fee simple title coexist, the fee simple interest operates merely as a reversionary right to possession

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[4] Sections 15-3-340 and 15-67-210 are quoted in part V of this opinion.

which can take effect only when Congress extinguishes the Indian title. Indian title includes the right to exclude all others, including holders of fee simple title, through state law possessory actions such as ejectment and trespass. Indian title cannot be alienated except by Act of Congress; a purported conveyance of the possessory right, even if made by a tribe having such title, is void and no title passes. Except where Congress provides otherwise, claims based on Indian title are not subject to state law defenses such as statutes of limitations, adverse possession, or laches. *See generally Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-74, 94 S.Ct. 772, 776-81, 39 L.Ed.2d 73 (1974); F. Cohen, *Handbook of Federal Indian Law*, 471-574 (1982 ed.).

The state correctly points out that the 1763 Treaty of Augusta, which is that source of the tribe's Indian title, is not recorded in the Registry of Mesne Conveyances. Relying on this fact, it argues that the tribe's Indian title is not legal title. It insists that legal title is record title; that is, the title that is reflected in the Registry of Mesne Conveyances, and it cites numerous cases from South Carolina and other jurisdictions that refer to legal title and record title synonymously.[5]

Neither South Carolina nor federal law supports the state's argument. The tribe's source of title is recorded, though not in the Registry of Mesne Conveyances. The Treaty of Augusta recites that the Catawbas accepted "the Tract of Land of Fifteen Miles square, a Survey of which

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[5] *See, e.g., Parr v. Parr*, 268 S.C. 58, 231 S.E.2d 695 (1977); *Lynch v. Lynch*, 236 S.C. 612, 115 S.E.2d 301 (1960); *Knight v. Hilton*, 224 S.C. 452, 456, 79 S.E.2d 871, 873 (1954).

by our consent and at our request has been already begun." XI Colonial Records of North Carolina 201-02 (1763). Current South Carolina law affirms that the survey was filed in the office of the Secretary of State. Section 27-15-30 describes the Catawba Indian lands as "situated in the counties of York and Lancaster, within a boundary of fifteen miles square and which are represented in the plat of survey made by Samuel Wiley, dated February 22, 1764 and now on file in the office of the Secretary of State." The state legislature recognized the survey filed in the office of the Secretary of State as a muniment of title, and it is reasonable to assume that the Supreme Court of South Carolina would take similar notice of it.

Our conclusion that lack of recordation in the Registry of Mesne Conveyances does not defeat the tribe's claim is substantiated by sound judicial precedent. The Superior Court of Law sustained a reservation for German immigrants in *Hawkins' Devisees v. Arthur*, 2 S.C.L. (2 Bay) 195 (1798). In 1730, the King of England offered "bounties of land" to his subjects residing in Germany. Notwithstanding the lack of a recorded deed, the court held that a reservation granted by the crown was superior to a subsequent grant from the state. The plat of a survey entered in the council books was a sufficient muniment of title. 2 S.C.L. (2 Bay) at 202-03. Even though the crown and subsequently the state held the reservation in trust for those persons who had a right of occupancy, the court ruled:

> As to the legal effect of this reservation, there could be no question about it. It amounted to a covenant in law, between the crown and the

> people, for whose use and benefit it was intended; that the land contained within the boundaries of the plat, should for ever thereafter be appropriated and disposed of, for the use and benefit of the inhabitants of the said town and township and their heirs for ever, and to and for no other intent and purpose whatsoever.

2 S.C.L. (2 Bay) at 203.

In *Thomas v. Daniel,* 13 S.C.L. (2 McCord) 354, 357 (1823), the Constitutional Court of South Carolina stated that a 1777 treaty between the Cherokees and the state which by "mutual engagements" granted the Indians the right to inhabit certain lands during good behavior "was at least as binding as any contract can be upon sovereign powers." The court held that an estate granted a nation during good behavior "must be an estate forever" and that as long as the Cherokees conformed to the treaty, that is " 'behaved themselves well,' this State was morally bound to permit them to continue in undisturbed possession of the land in question." 13 S.C.L. (2 McCord) at 357. The court then held that a subsequent grant by the state of a part of the reservation to a person who challenged the Cherokee grant was void. The lack of recordation in the Registry of Mesne Conveyances was no impediment to the Cherokees' title. Although the Constitutional Court did not use the term Indian title, the Indians' "estate forever" had incidents of Indian and legal title.

Current South Carolina law is consistent with the precedent established by *Thomas* and *Hawkins' Devisees.* Recordation in the Registry of Mesne Conveyances, while often a convenient proof of a conveyance, is not essential

to establish legal title. In *Haithcock v. Haithcock*, 123 S.C. 61, 68, 115 S.E. 727, 729 (1923), the Supreme Court of South Carolina approved an instruction that explained to a jury how a claim of title can be established:

> Now, those are the ways in which a man may show title to land: First, by tracing it to the state, under a grant from the state; second, by tracing his title from a common source; third, by showing possession for 20 years in himself and those under whom he claims; and, fourth, by showing 10 years' possession in himself, or by inheritance.

The tribe rests its title on the first way – a grant of a reservation from the crown recognized by the state. Indeed, this grant is the common source of title, because the lessees of land encompassed by the grant and their successors, present occupants, trace title to the same crown reservation through grants made pursuant to the subsequent Treaty of Nation Ford. *See* S.C. Code Ann. §§ 27-15-30, -40, and -50.

Haithcock is also singularly instructive because it applies the statutory presumption on which the tribe relies without requiring proof of recordation or registry. After repeating four ways in which a person can prove title, the trial court correctly charged the jury: "Now, if he has shown that kind of title, then the possession is presumed to have been in the man who shows title in either one of these four ways." 123 S.C. at 85, 115 S.E. at 734. This presumption of possession is precisely what the tribe claims, having traced its title in the first of the four ways explained by the court.

Since 1698 South Carolina has had recording acts. *See Epps v. McCallum Realty Co.*, 139 S.C. 481, 497, 138 S.E. 297, 302 (1927). Notwithstanding this long established provision for recordation, the state has cited no case holding that proof of recording in the Registry of Mesne Conveyances is necessary in order to establish legal title within the meaning of section 15-67-210. This lack of precedent is not surprising because "recording becomes material only when there are double conveyances by the same person, or where there are subsequent creditors." *First Carolinas Joint Stock Land Bank v. Hudgens*, 171 S.C. 18, 21, 171 S.E. 449, 451 (1933). Neither of these situations is involved in this case.

Because the South Carolina legislature recognized in section 27-15-30 that the 1764 survey of Catawba lands was duly filed, we conclude that based on its precedents the Supreme Court of South Carolina would hold that the tribe's claim to legal title for the purpose of invoking the presumption provided in section 15-67-210 is not defeated by lack of recording in the Registry of Mesne Conveyances.

IV

The state also argues that the tribe lacks legal title because Indian title cannot be alienated except by Act of Congress. Without the ability to alienate the tract of fifteen square miles, the state argues the Indians had only equitable, not legal, title.

The state's argument requires us to examine the relationship of the United States as a guardian or trustee for the tribe particularly with respect to the nature of the

tribe's Indian title. In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68, 94 S.Ct. 772, 777-78, 39 L.Ed.2d 73 (1974), the Court succinctly stated the nation's policy with respect to lands occupied by Indians:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign – first the discovering European nation and later the original States and the United States – a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. . . . The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that "no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." This has remained the policy of the United States to this day.

The original 13 states hold the underlying fee simple title for lands subject to Indian title within their respective borders. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139-43, 3 L.Ed. 162 (1810). Elsewhere the United States holds fee simple title. But this naked fee gives the holder no possessory interest in the land. It constitutes merely a reversionary interest until Congress extinguishes the Indian title.[6] Congress's exclusive right to extinguish Indian title results from its trust relationship over Indian tribes. F. Cohen, *Handbook of Federal Indian Law*, 489 (1982 ed.). The federal trust relationship over Indian tribes is derived from the constitutional power conferred on Congress to regulate commerce with the Indian tribes and to make treaties. U.S. Const. art. I, § 8, cl. 3; art. II, § 2, cl. 2; *see McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n. 7, 93 S.Ct. 1257, 1262 n. 7, 36 L.Ed.2d 129 (1973); F. Cohen, *Handbook of Federal Indian Law*, 207-12 (1982 ed.).

In *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574, 5 L.Ed. 681 (1823), Chief Justice Marshall described a tribe holding Indian title "as the rightful occupants of the soil, with a legal as well as just claim to retain possession of it." Because only the United States could extinguish the tribal right, a conveyance by the tribe without the assent of the United States was inoperative. *Johnson's* principles, as developed in subsequent decisions, indicate that

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[6] In 1838, South Carolina transferred its reversionary interest in the tribe's land to lessees of the land. *See* § 27-15-30. This reversionary interest, conditioned upon the United States extinguishing the tribe's Indian title, is so remote that, like a possibility of reverter, it does not rise to the dignity of an estate. *See Adams v. Chaplin*, 10 S.C.Eq. (1 Hill) 265, 277 (1833).

"Indian title represents a perpetual right of use and occupancy (until extinguished) virtually equivalent to a fee interest against all but the United States." F. Cohen, *Handbook of Federal Indian Law* 488, 489 (1982 ed.).

Johnson dealt with aboriginal land, but the Court has applied similar principles to lands that were the subject of grants or reservations by the crown. In *Mitchel v. United States*, 34 U.S. (9 Peters) 711, 9 L.Ed. 283 (1835), the Court recognized Indian title that originated in royal grants. Speaking of rights conferred on the Indians, the Court said that "it is enough to consider it as a settled principle, that their right of occupancy is considered as sacred as the fee-simple of the whites." 34 U.S. (9 Peters) at 746.

Again, in *United States v. Shoshone Tribe*, 304 U.S. 111, 117, 58 S.Ct. 794, 798, 82 L.Ed. 1213 (1938), the Court said: "Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title."

In *United States v. Tillamooks*, 329 U.S. 40, 46, 67 S.Ct. 167, 170, 91 L.Ed. 29 (1946), the Court reiterated: "As against any but the sovereign, original Indian title was accorded the protection of complete ownership; but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will." But termination at will does not leave a tribe wholly unprotected. The Court held:

> The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute. It

> does not "enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them."

329 U.S. at 54, 67 S.Ct. at 174.

In *United States v. Kagama*, 118 U.S. 375, 381, 6 S.Ct. 1109, 1112, 30 L.Ed. 228 (1886), the Court observed: "The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character." Perhaps in no other context is this anomaly more apparent than the government's trusteeship of Indian lands. Indian title is not a common garden variety equitable title entirely governed by the precepts of chancery. It is a title derived from aboriginal possession subject to the right of discovery and conquest and in many instances, as here, dignified by royal grant. "The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all the States, including the original 13." *Oneida*, 414 U.S. at 670, 94 S.Ct. at 778. The court has instructed that the Indians' right of occupancy is to be "as securely safeguarded as is fee simple absolute title." *Shoshone*, 304 U.S. at 117, 58 S.Ct. at 798. Indian title confers on a tribe occupying the soil "a legal as well as just claim to retain possession of it." *Johnson*, 21 U.S. (8 Wheat.) at 574. A legal claim presupposes a legal title. Chief Justice Marshall did not speak of an equitable claim based on equitable title. These precedents establish that as a matter of federal law, for the purpose of recovering possession of real property and

damages against any defendant other than the United States, Indian title is equivalent to fee simple absolute title. It is legal title.

The argument that the Catawbas have equitable title precluding the tribe from invoking the presumption afforded by section 15-67-210 conflicts with the policy of the United States and the Nonintercourse Act. This policy and the Act protect Indian tribes in their rightful occupancy of their lands. To use the trusteeship created by the Constitution and implemented by the Act to defeat a tribe's right of occupancy would indeed be ironic and unjust. Serious issues involving the application of the Supremacy Clause and the Equal Protection Clause would arise if a state in violation of the Nonintercourse Act were to dispossess a tribe and then defeat a tribe's legal claim to possession by denominating its title as equitable. Fortunately, we need not address these constitutional issues because we have no doubt that the Supreme Court of South Carolina, taking cognizance of federal precedents and its own precedents, would hold that section 15-67-210 entitles the tribe to the presumption of possession.

V

Having determined that the tribe's Indian title is legal title within the context of section 15-67-210, we must next decide the effect of the statutory presumption of possession on the rights of the tribe and the rights of the present occupants.

Standing alone South Carolina's 10-year statute of limitations would bar the tribe's claim.[7] This is the basis of the district court's opinion, and it is the position urged by the state. Section 15-3-340 provides:

> No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appear [sic] that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of such action.

But the 10-year statute cannot be read in isolation. It must be read in conjunction with section 15-67-210. This section provides:

> In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law. The occupation of such premises by any other person shall be deemed to have been under an in subordination to the legal title unless it appear [sic] that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action.

This section is applicable to the tribe's claim. It brought an action to recover possession of real property. It has legal title to the property. Consequently, it is "presumed to have been possessed thereof within the time required

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[7] South Carolina also recognizes a 20-year presumption of grant doctrine and a 40-year statute of repose, § 15-3-330. But these are not an issue in this case.

by law." What time? The 10 years specified in section 15-3-340 that is a prerequisite for bringing an action for the recovery of real property. Therefore, the plain text of sections 15-3-340 and 15-67-210 authorizes the tribe to maintain its action to recover possession of their tribal lands.

The state, however, contends that inasmuch as the tribe acknowledges that it has not been in possession of the land since 1840, this judicial admission precludes it from relying on the presumption. It relies on the axiom that a presumption must give way to reality when a fact is shown, and for this proposition it cites cases that do not discuss section 15-67-210.[8]

The difficulties with the state's argument are several. The tribe never admitted that it is not entitled to the presumption of possession. It has steadfastly maintained that its legal title enables it to claim possession for the necessary 10 years to maintain this action.

Section 15-67-210 does not require a plaintiff to show both legal title and possession, and we decline to place such a gloss on the statute. True, the presumption of possession is not conclusive. It can be rebutted, and the statute expressly states how it can be rebutted. Rebuttal may be accomplished according to the terms of the statute by showing "such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action." The statute does not

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[8] *See, e.g., Galpin v. Page,* 85 U.S. 350, 366, 21 L.Ed. 959 (1873); *Fouche v. Royal Indemnity Co. of New York,* 217 S.C. 147, 60 S.E.2d 73 (1950); *Kaylor v. Hiller,* 77 S.C. 393, 58 S.E. 2 (1907).

allow rebuttal by simply showing that the plaintiff has not been in possession or that the plaintiff has admitted lack of possession.

The tribe's position is sustained by *Love v. Turner,* 71 S.C. 322, 51 S.E. 101 (1905). In that case the plaintiff claimed title to a 100-acre tract by a grant from the state, subsequent deeds, and a will. The defendant denied the plaintiff's title and pled the statute of limitations and adverse possession, claiming title through a sheriff's deed and subsequent deeds. Judgment was entered for the plaintiff, and the defendant assigned error to the trial court's refusal to give the following charge:

> If neither the plaintiff nor any one under whom he claims title to the land in dispute has been seized or possessed of the land in question within ten years before the alleged acts of trespass were committed, then the plaintiff cannot recover.

71 S.C. at 330, 51 S.E. at 104. Ruling on this assignment of error, the Supreme Court said:

> If plaintiff had the legal title, he was presumed to be possessed of the land within the ten years, and it was necessary to rebut this presumption by proof of continuous adverse possession of some other person for ten years. The request embodying the foregoing proposition was, therefore, properly refused. (citations omitted)

71 S.C. at 330, 51 S.E. at 104. It should be noted that the charge, which the defendants sought and the court properly refused, is similar to the proposition the state asserts in the instant case. The court's ruling reflects the position of the tribe.

Similarly in *Crotwell v. Whitney*, 229 S.C. 213, 92 S.E.2d 473 (1956), the Court applied the predecessor of section 15-67-210 without the gloss that the state now seeks. In *Crotwell*, the plaintiffs founded their claim to title upon a deed executed by their father. The defendants claimed under a tax deed, adverse possession, presumption of a grant, and laches. The trial court entered judgment for the plaintiffs, and the Supreme Court affirmed, holding:

> Plaintiffs having established their legal title to the premises, appellant Whitney's claim of title by adverse possession required proof of actual, open, notorious, hostile, continuous and exclusive possession by him, or by one or more persons through whom he claimed, for the full statutory period of ten years, without tacking of possession except by descent cast.

229 S.C. at 220-21, 92 S.E.2d at 477. Again, the Court's construction of the statute is precisely that which the tribe asserts should be applied to its claim.

In *Crotwell*, the Court cited as authority *Haithcock v. Haithcock*, 123 S.C. 61, 115 S.E. 727 (1923), a case on which both parties rely. The plaintiff in *Haithcock* alleged title to 37 acres. The defenses were a general denial, adverse possession for 35 years, and the statute of limitations for 10, 20, and 30 years. The plaintiff prevailed, and the defendant appealed, assigning numerous errors. The Supreme Court affirmed. It held that the charge was correct and ordered that it be reported. Thus, the precedent established by the case is set forth in the charge.

The trial court explained to the jury that a man may obtain title by grant. It said:

> The title to all land was originally in the state, in the sovereign, or, prior to the Revolution, in the crown of England – and that is called the source of all title, in the state. So the first way in which a man may establish title to land is by showing a grant from the state, the source of all title, to himself, or a grant from the state to some one, and then by successive deeds, down to him. That is called a perfect legal paper title, a deed to himself, and then tracing back to some one else and to some one else, until it reaches the state, and then a grant from the state to the first holder of the land.

123 S.C. at 66-67, 115 S.E. at 729. This is precisely the way the tribe obtained title – by a grant from the English Crown before the Revolution. By well established law, and as a matter of fact, South Carolina recognized the grant.

The *Haithcock* trial court then explained how a defendant can defeat title. As a part of its charge it explained the 10-year statute of limitations now codified as section 15-3-340 upon which the state relies. The state quotes the following extract of the charge to establish its position:

> [The defendant] may defeat the plaintiff's title by showing that the plaintiff himself has not been in possession for 10 years next before the beginning of this action; for, gentlemen, the law makes possession a very strong factor in the question of title to real estate, and it says that if a man stays out of possession for 10 years, asserts no claim to a piece of property, does not occupy it by himself or tenants, and lets that situation remain for 10 years, the law says that it is too late for him to come in, that he is barred

> by the statute of limitations, and having slept on his rights for as long as 10 years, he cannot come in afterwards and assert his rights.

123 S.C. at 69, 115 S.E. at 729. Taken in isolation out of context this extract from the charge would seem to support the state. But it does not. For in the next paragraph of the charge, which the state omitted to quote, the Court explained that possession could be established by the presumption that is now codified as section 15-67-210 upon which the tribe relies. The Court said:

> Now, what is possession of land? I charge you that, under the law, if one shows paper title – a deed or will or legal paper title of any kind, to land – then the law presumes that he was in possession of that land, and that his title gives him the possession; that is, the possession follows the title. Perhaps I had better read you what the statute says on that question. Now, pay attention to this, because this is the act of the Legislature, and is the law that governs us all: "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for 10 years before the commencement of such action." Code Civ. Proc. 1912, § 126.
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> In other words, gentlemen, the law presumes, where a man shows title, he need not be on the land, he need not be in 10 miles of the

> land, if he shows perfect legal title, then the law says the possession follows the title, and he is deemed to be in possession if he show a good legal title to the land, although he may never have seen the land; and that presumption holds unless, and until, some one else goes on the land and occupies and holds it adversely to that right for 10 consecutive years.

123 S.C. at 69-70, 115 S.E. at 729-30. It is quite apparent that the trial court's charge, approved by the Supreme Court of South Carolina, expressly refutes the state's argument. It is difficult to envision how a plaintiff who has "not been in 10 miles of the land" or who "may never have seen the land" could satisfy the state's argument that he must also be in possession of the land for 10 years. The correct analysis of the law, as the trial court lucidly explained in *Haithcock*, is that legal title without actual possession will satisfy the statutory presumption of possession.

We conclude that the tribe is entitled to invoke the presumption set forth in section 15-67-220, and its claim is not barred because it acknowledged that it did not actually possess the land for the 10 years specified in section 15-3-340.

VI

The second sentence of section 15-67-210 defines both the status and the rights of the present occupants. The first clause provides: "The occupation of such premises by any other person shall be deemed to have been under and in subordination of the legal title. . . . " This clause

without more would defeat the state's claim, for permissive possession is not adverse. *Haithcock*, 123 S.C. at 84, 115 S.E. at 734. But the clause is subject to this important proviso, "unless it appear [sic] that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action." This proviso would appear to doom the tribe's claim, because this action was not commenced until 1980. But South Carolina's tacking doctrine forestalls this conclusion.

The doctrine is succinctly stated by David H. Means, Professor of Law, University of South Carolina, as follows:

> The rule in this State, contrary to the view of the overwhelming majority of jurisdictions, is that even though there be privity by deed or devise between successive adverse occupants of land, the possession of such occupants cannot be tacked to make out title by adverse possession under the statute of limitations. Such tacking has been permitted, however, in the case of a continuation by the heir of the possession of the ancestor dying intestate. (footnotes omitted)

D. Means, Survey of South Carolina Law: Property, 10 S.C.L.Q. 90 (1957).

Ellen v. Ellen, 16 S.C. 132, 141 (1881), explains the reason tacking is prohibited:

> [A]n adverse possessor is a trespasser from the beginning to the end. His possession begins in trespass, and so continues until it ripens into a right at the end of the statutory period of ten years. During this time he has nothing that he can convey; nor can his possession be tacked

> with that of his grantee so as to defeat the title of the true owner.

In contrast, an heir can tack the possession of his ancestor dying intestate "upon the theory that there is no new entry or trespass, but that the possession of the ancestor is cast by operation of law upon the heir, hence there is no break in the continuity of possession." *Burnett v. Crawford*, 50 S.C. 161, 166, 27 S.E. 645, 647 (1897).[9]

South Carolina's prohibition against tacking applies to both a plaintiff who seeks to establish title by 10 years of adverse possession and a defendant who asserts the 10-year statute of limitations, section 15-3-340, as a defense. *See, e.g., Haithcock*, 123 S.C. at 75, 115 S.E. at 731 (plaintiff); and *Crotwell*, 229 S.C. at 221-22, 92 S.E.2d at 477-78 (defendant).

Application of South Carolina's tacking doctrine precludes the tribe from prevailing against a person who owns property that has been held adversely for 10 years in the relevant period of time without tacking except by inheritance. Conversely, a person who must rely on prohibited tacking cannot prevail against the tribe.

VII

In view of the dissent's concern, a brief explanation of the district court's jurisdiction is appropriate. In paragraph 2 of its complaint, the tribe invoked jurisdiction pursuant

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[9] Tacking is permitted when a claim or defense is founded on the 20-year presumption of a grant or on the 40-year statute of repose. D. Means, Survey of South Carolina Law: Property, 10 S.C.L.Q. 90, n. 2 (1957).

to 28 U.S.C. § 1331 (federal question), § 1337 (an action or proceeding arising under an act of Congress regulating commerce), and § 1362 (claim asserted "by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."). In paragraph 3, the tribe alleged that its claims for relief arise under the Treaty of Pine Tree Hill, the Treaty of Augusta, Article I, Section 8 and Article VI of the Constitution (Commerce Clause and Supremacy Clause), and 25 U.S.C. § 177 (the Indian Nonintercourse Act).

On the basis of the facts assumed for the purpose of considering the summary judgment motion, which the state filed, there is no suggestion that the district court would have lacked jurisdiction to decide the tribe's claim if the tribe had brought its action before the passage of the Catawba Act in 1962. The question, therefore, is to what extent Congress intended the Catawba Act to affect the tribe's claim. In *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 510, 106 S. Ct. at 2046, the Supreme Court answered this question, saying:

> We do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute became effective. Rather, we assume that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction.

The Court's explanation establishes that, with the exception of the application of the state statute of limitation, Congress intended that every element of the tribe's claim "remained exactly the same immediately before and immediately after the effective date of the Act." The tribe's capacity to invoke federal jurisdiction pursuant to 28 U.S.C. §§ 1337 and 1362 was not defeated by the enactment of the Catawba Act.

Section 1331 provides another independent basis for jurisdiction. This section gives district courts jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States." The tribe's complaint alleged a right of occupancy under treaties with the British Crown that were implemented by the Nonintercourse Act. These allegations of Indian title sufficed to satisfy the well-pleaded complaint rule.

The tribe's allegations distinguish the case from *Taylor v. Anderson*, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914), where federal jurisdiction was lacking. In that case the plaintiffs did not allege Indian title, but only that the defendant's title was void because of an Act restricting alienation of Choctaw and Chickasaw allotments. The distinction is fully explained in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), which held that a complaint alleging right of occupancy based on Indian or aboriginal title protected by the Nonintercourse Act established jurisdiction under section 1331. *Oneida* explained that the right to possession under a claim of Indian title is based on federal law. Therefore, the federal issue does not arise solely in anticipation of a defense. *Oneida* also reiterated that Indian title is a matter of federal law and that it can be extinguished

only with federal consent. 414 U.S. at 666-74, 94 S.Ct. at 776-81. In *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. at 510, 106 S.Ct. at 2046, the Court held that the Catawba Act did not extinguish the tribe's claim of Indian title.

Many federal issues remain to be tried on remand, and the tribe may ultimately lose its case. Nevertheless, here, as in *Oneida*, the tribe's assertion of a federal right of occupancy governed by federal law is not "so devoid of merit as not to involve a federal controversy within the jurisdiction of the district court." 414 U.S. at 666, 94 S.Ct. at 776. The principles explained in *Oneida* demonstrate that the tribe's complaint did not run afoul of the well-pleaded complaint rule.

We conclude that sections 1331, 1337, and 1362, and each of them, confer jurisdiction on the district court. Moreover, the Supreme Court has definitively decided the effect that Congress intended the Catawba Act to have on the tribe's claim. On this issue its decision is final. We are not at liberty to attribute to Congress a different intention in order to question jurisdiction. The Supreme Court has issued its mandate directing us to decide the issue pertaining to the state statute of limitations. *See* 476 U.S. at 511, 106 S.Ct. at 2046. Sound principles of appellate procedure counsel compliance with the Court's mandate. *See Skillern's Ex'rs v. May's Ex'rs*, 10 U.S. (6 Cranch) 267, 3 L.Ed. 220 (1810).

VIII

We hold that sections 15-3-340 and 15-67-210 bar the tribe's claim against each person who holds and possesses property that has been held and possessed adversely for 10 years after July 1, 1962, and before October 20, 1980, without tacking except by inheritance, in accordance with South Carolina's tacking doctrine. The statutes of limitations do not bar the tribe's claim against other persons. "Person" includes joint tenants, tenants in common, partnerships, associations, and corporations.

The judgment of the district court is affirmed in part and reversed in part, and this case is remanded for further proceedings consistent with this opinion. Each party shall bear its own costs.

WIDENER, Circuit Judge, dissenting:

Although I join in Judge Hall's dissent, I write separately to add a few words.

First, the Supreme Court has not hesitated to dismiss actions on grounds akin to jurisdictional even after prolonged litigation. In *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), the Court dismissed the action, finding that the defendant's actions were immune from the antitrust laws. The dismissal took place some eleven years after the suit began and seven years after the Supreme Court had the opportunity to address the same issue and did not.[1] *Hughes Tool*

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[1] In 1964, the Supreme Court granted certiorari, but, after oral argument and briefing, which included the issues upon which the case was ultimately decided, in 1965 dismissed the

Co., 409 U.S. at 392, 93 S.Ct. at 663 (Chief Justice Burger dissenting). Merely because the Catawbas' suit has been in the court system for some time and the Supreme Court has addressed the suit without explicitly considering jurisdiction is no reason to shy away from the jurisdictional issue. *Hagans v. Lavine*, 415 U.S. 528, 534-35 n. 5, 94 S.Ct. 1372, 1378 n. 5, 39 L.Ed.2d 577 (1974).

Second, I see no reason why the presumption of possession relied upon by the Catawbas to save their action from South Carolina's statute of limitations is not rebutted by the Catawbas' judicial admission that they had been out of possession for 140 years when they filed suit. Although there are no South Carolina cases, similar

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writ as improvidently granted. *Hughes Tool Co.*, 409 U.S. at 391-92, 93 S.Ct. at 662-63. The Court nevertheless did not hesitate to dismiss the suit on the same grounds in 1973 when the case was there a second time.

I have used the words "akin to jurisdictional" in an abundance of caution and out of deference to the Court in *Hughes Tool* which stated that the Federal Aviation Act did not "completely replace" the antitrust laws. Of course if *Hughes Tool* is not purely jurisdictional, it is an even stronger precedent for my point of view than a case decided on a question relating purely to subject matter jurisdiction. In this respect, I note that the Second Circuit, in an earlier appeal in this same case, *Trans World Airlines v. Hughes*, 332 F.2d 602 (2d Cir.1964), treated the question as jurisdictional and that Sullivan in his treatise, *Antitrust*, West 1977, p. 746, et seq. considers the question one of primary jurisdiction. I also note that the Court in *Hughes Tool*, 409 U.S. at 364, 365, n. 1, 93 S.Ct. at 650, n. 1, as precedent for proceeding as it did, relied on *Indianapolis v. Chase National Bank*, 314 U.S. 63, 62 S.Ct. 15, 86 L.Ed. 47 (1941), in which case a question of jurisdiction which had been presented to the Court, but not decided, was later decided upon subsequent consideration by the Court.

presumptions in other States have been subject to rebuttal. See *Beneficial Life Ins. Co. v. Wakamatsu*, 75 Idaho 232, 270 P.2d 830 (1954). In *Kirkman v. Holland*, 139 N.C. 185, 51 S.E. 856, 857 (1905), the court would not even consider the presumption of possession arising from a statute indistinguishable from the one at issue here, given a judicial admission rebutting it. In South Carolina, the "allegations, statements or admissions contained in a pleading are conclusive as against the pleader." *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964). In their complaint, the Catawbas admit being out of possession since 1840. The presumption of possession in favor of the Catawbas, assuming arguendo that they have "legal title," has therefore been rebutted. The majority's approach, not permitting the defendants to rebut the presumption of possession once legal title is established (except by adverse possession), defeats the very purpose of South Carolina's statute of limitations by allowing stale claim. If South Carolina had intended to give parties who could establish "legal title" *no* time limit to file suit, it could have done so instead of merely creating a presumption of possession. Civil presumptions in South Carolina are usually rebuttable. *Palm v. General Painting Co. Inc.*, 296 S.C. 41, 370 S.E.2d 463, 466 (1988) (presumption of legitimacy when born in wedlock); *McDowell v. S.C. Dept. of Social Services*, 296 S.C. 89, 370 S.E.2d 878, 880 (App.1987) (presumption of gift to a close relative); *Touchberry v. City of Florence*, 295 S.C. 47, 367 S.E.2d 149, 150 (1988) (presumption that public contract not enforceable by an individual as third party beneficiary); *Mathias v. Hicks*, 363 S.E.2d 914, 916 (S.C.App.1987) (presumption that collateral is worth indebtedness); *Woods v. Bivens*, 292 S.C. 76, 354

S.E.2d 909, 911 (1987) (presumption that possession of one tenant in common is possession by all); *Estate of Mason v. Mason*, 289 S.C. 273, 346 S.E.2d 28,31 (App. 1986) (presumption that a missing will was destroyed by testator); *McBride v. Atlantic Coast Line R. Co.*, 140 S.C. 260, 138 S.E. 803, 807 (1927) (presumption that when railroad fails to use warning signals that the failure is proximate cause of injury); *McMillan v. General American Life Ins. Co.*, 194 S.C. 146, 9 S.E.2d 562, 574-75 (1940) (presumption against suicide). Logic and South Carolina precedent require, I think, the conclusion that the presumption of possession created in S.C. Code § 15-67-210 is also rebuttable and has been rebutted in this case by the admission of the Catawbas.

Circuit Judge HALL, joins in this dissent.

HALL, Circuit Judge, dissenting:

As an intellectual exercise, I disagree with the majority's analysis of South Carolina law as it relates to the Catawbas' duty to assert their claim within ten years of the Tribe's 1962 dissolution. In my view, either the removal of disability provision of S.C.Code § 15-3-370[1] or

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[1] The majority mechanically rejects any role for § 15-3-370 on the ground that it specifically applies only to minors, mental incompetents, and prisoners. The majority fails to recognize, however, that the statute was broadly written to cover all classes of citizenry normally assumed to be under a legal disability. See 51 *Am.Jur.2d*, Limitations of Action §§ 178 *et seq.* Although the South Carolina legislature did not expressly provide for Indians, it clearly did intend that any South Carolina citizen whose legal status excused a timely assertion of legal rights would pursue those rights within ten years of a change in that

the more general statute of limitations in S.C. Code § 15-3-340[2] would effectively bar the Catawbas' instant

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status. The Catawbas' action, in my view, falls within the broad intent of the statute by analogy and should be barred for that reason.

[2] In reasoning that Indian title is legal title conferring a presumption of possession under § 15-67-210 and, thereby defeating the ten-year statute of limitations provided in § 15-3-340, the majority has permitted an exception to devour the rule. South Carolina has clearly sought to impose finality in potential land disputes by requiring a party out of actual possession to bring an action within ten years. The only exception to that general rule is the presumption of possession accorded the holders of "legal title" by § 15-67-210. Logically, however, "legal title" must be some mechanism that would give adequate notice to another claimant that the statute of limitations is unavailable.

South Carolina law unquestionably treats recordable titles with special deference. South Carolina Code § 15-3-380 specifically provides that a chain of title "by virtue of a written instrument" extending for forty years "shall be deemed valid against the world." In my view, the presumption of possession in § 15-67-210 is a product of the same rationale that produced § 15-3-380. Although it has not been expressly asserted on appeal, I am convinced that the present South Carolina landholders, who undoubtedly have chains of title exceeding forty years, are entitled to prevail under 15-3-380 and to defeat the presumption of possession in § 15-67-210.

In reaching a contrary position, the majority has fallen into the morass created by careless language in older South Carolina property law decisions such as *Haithcock v. Haithcock*, 123 S.C. 61, 115 S.E. 727 (1923). In *Haithcock*, the term "title" is alternatively used to refer to a superior possessory interest as well as the legal indicia of that interest. Significantly, however, the court in *Haithcock* discussed the presumption of possession only in connection with a "paper title" – a recordable instrument. 123 S.C. at 69-70, 115 S.E. at 729-30. By focusing instead upon the four ways upon which a possessory interest in land can be

possessory action. My principle objection to the majority's decision is more fundamental, however. In light of the Supreme Court's discussion of the effect of the Catawba Indian Tribe Division of Assets Act, 25 U.S.C. §§ 931-938 in *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986), and the well-established jurisdictional doctrine of *Taylor v. Anderson*, 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218 (1914), I am persuaded that federal jurisdiction over the Catawbas' claim has never existed.

In the original complaint, the Catawbas sought to invoke federal jurisdiction on three bases: (1) federal question pursuant to 28 U.S.C. § 1331 [jurisdiction over "all civil actions arising under the Constitution, laws or treaties of the United States"]; (2) Indian tribe pursuant to 28 U.S.C. § 1362 [jurisdiction over "all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States"]; and (3) regulation of commerce pursuant to 28 U.S.C. § 1337 [jurisdiction over a civil action arising under "any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies"]. The last

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validly obtained in South Carolina and granting to each a presumption of possession, the majority has created a statute of limitations that doesn't limit anyone except parties who could not prevail in any event. I find this interpretation of the South Carolina statute utterly irrational. I also find the failure to address § 15-3-380 particularly troubling in light of the extensive treatment of South Carolina law attempted in the majority opinion.

theory was advanced to support the allegation that an 1840 conveyance of the land at issue by the Catawbas was achieved in contravention of the 1799 Indian Nonintercourse Act, 25 U.S.C. § 177. The Supreme Court's decision in *Catawba* leaves no doubt, however, that neither section 1362 nor 1337 was ever a legitimate ground for federal litigation.

In *Catawba*, the Court quoted prominently from section 5 of the Catawba Act, which provides that:

> The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466, to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States.

Based on that provision, the Court clearly concluded that after the 1962 effective date of the Catawba Act, the trust relationship between the United States and the Catawbas was dissolved, the federal statutory protection for Indians was no longer applicable to them and the laws of

South Carolina controlled their right, if any, to the land claimed in this case. *Catawba,* 106 S.C. at 2043.[3]

It is now beyond question that when the plaintiffs/appellees initiated their action in 1980 they were not Indians as that term is used in federal law. At most, the appellees are a collection of South Carolina residents of Indian descent who are successors in interest to a defunct tribe – a point expressly acknowledged by the Supreme Court when it described appellees as "a nonprofit corporation organized under the laws of South Carolina in 1975." 106 S.Ct. at 2040 n. 2. The essential jurisdictional prerequisite for 28 U.S.C. § 1362 – an "Indian tribe . . . duly recognized by the Secretary of the Interior. . . . "was plainly absent.[4] Similarly, the dissolution of the Catawbas in 1962 undermined the jurisdictional validity of the Nonintercourse Act claim asserted under 28 U.S.C. § 1337. The continued existence of a trust relationship is required in order to invoke a Nonintercourse Act claim in federal court. *See e.g., Joint Tribal Council of Passamaquoddy Tribe v. Morton,* 528 F.2d 370 (1975).

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[3] The Court's reasoning was supported prominently by citation to cases such as *Larkin v. Paugh,* 276 U.S. 431, 48 S.Ct. 366, 72 L.Ed. 640 (1928) (termination of trust relationship rendered consideration of land disputes appropriate in state courts, "the land being there.") *Catawba,* 106 S.Ct. 2045 n. 19.

[4] The unavailability of section 1362 has particular significance in light of the fact that the State of South Carolina is a named defendant. The statue abrogates a state's normally applicable immunity under the eleventh amendment. *Lac Courte Oreilles Band, etc. v. State of Wisconsin,* 595 F.Supp. 1077 (W.D.Wisc.1984). If section 1362 is, as I believe, inapplicable, the Catawbas' action against the State is constitutionally suspect.

Without sections 1362 or 1337, the only remaining ground on which appellees might assert federal jurisdiction is the general federal question provision of section 1331. A review of the history of this case reveals, however, that jurisdiction on that theory runs afoul of the long-established rule that a federal question must appear on the face of a "well-pleaded complaint." See Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction 2d § 3566. The Catawbas' initial complaint, which asserted purely state claims for ejectment and trespass damages, failed that test. Indeed, federal law did not enter this case until it was belatedly asserted by the Catawbas in response to the defendants' attempted reliance upon South Carolina statutes of limitation.

The Supreme Court in *Taylor, supra,* unhesitatingly applied the well-pleaded complaint rule to defeat a possessory land claim advanced by individual Indians. The Indians had alleged that certain defendants were in possession of Indian land in violation of "legislation of Congress restricting the alienation of lands allotted to the Choctaw and Chickasaw Indians." 234 U.S. at 74-75, 34 S.Ct. at 724. The Court reasoned that federal jurisdiction was lacking since the action was one for ejectment and the allegations involving federal law were "neither essential nor appropriate." *Id.* In approving of the result in *Taylor,* modern commentators have agreed that an action for the possession of land does not arise under federal law simply because there is a potential federal issue in the chain of title. Wright, Miller & Cooper, *Id. see also* F. Cohen, *Handbook of Federal Indian Law,* 312 (1982 ed.).

The subsequent decision in *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73

(1974), recognized an exception to the *Taylor* rule for possessory actions brought by an Indian tribe in a current trust relationship with the federal government. In circumstances where the land title is under "continuous" federal protection, the Court reasoned that a right of possession necessarily raises a federal question. *Id.* at 676-77, 94 S.Ct. at 781-82. I see nothing in *Oneida*, however, that would extend its reach to situations where there is no trust relationship that would indicate a "continuing federal interest" in the land in dispute. 414 U.S. at 683, 94 S.Ct. at 785, Rehnquist, J., concurring.[5] It follows, therefore, that the Catawbas, who unquestionably had no trust relationship with the United States, have asserted what must be seen as a purely state law cause of action falling squarely within the jurisdictional limitations of *Taylor v. Anderson*.

I, of course, recognize that it is late in the day to raise a jurisdictional objection to this prolonged litigation. It is also true that this Court, as did the district court below and the Supreme Court above, has addressed this case on the merits without examining the jurisdictional implications. This omission is in large part a result of the parties'

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[5] Certainly the Supreme Court did not intend for its decision to "disturb the well-pleaded complaint rule of *Taylor v. Anderson*," *Oneida*, 414 U.S. at 677, 94 S.Ct. at 782. Lower courts have also recognized that *Oneida* left *Taylor* intact. See *State of New York v. White*, 528 F.2d 336, 339 (2d Cir.1975) (concluding that *Oneida* was a "narrow ruling" based on the "unique relationship" between the federal government and Indian nations). In the present case, the "unique relationship" had obviously been terminated well before the litigation began. It is a clear failure to appreciate the interplay of *Taylor* and *Oneida*, as well as a serious misreading of *Catawba* that dooms the effort to assert jurisdiction in section VII of the majority opinion.

failure to raise the issue. It cannot, however, relieve us of our fundamental responsibility to insure that we decide only those cases that fall within our lawful authority as a court of limited jurisdiction.

We certainly cannot assume that the Supreme Court's treatment of the merits in *Catawba* or even its remand of the state law issues to this Court amounts to a finding of jurisdiction. Jurisdiction was not specifically addressed in *Catawba*. Moreover, the Court itself has acknowledged on other occasions that the passing of a jurisdictional question *sub silentio* does not resolve that issue. *Hagans v. Lavine*, 415 U.S. 528, 534-35 n. 5, 94 S.Ct. 1372, 1378 n. 5, 39 L.Ed.2d 577 (1974). The existence of jurisdiction remains open for consideration when properly raised.

The implications of the majority's decision are profound. The ownership interests of over 25,000 South Carolina landowners will be impaired and in many cases overturned notwithstanding chains of title of previously unquestioned validity. If South Carolina law, which the Supreme Court has recognized as controlling, compels that result then so be it. It offends reason and justice, however, for the assessment of South Carolina law to be conducted by a court without jurisdiction and with no special familiarity with the relevant law.[6] I am persuaded

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[6] The Supreme Court's remand of the state law issue in *Catawba* was based upon the traditional deference accorded the Courts of Appeals and the district courts to resolve state law issues arising within their jurisdictions. *E.g. Propper v. Clark*, 337 U.S. 472, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949). That deference, however, is rooted in the assumption that at least some of the district and appellate judges involved are usually from the state

that, today, we are such a court. Accordingly, I respectfully dissent from the majority's resolution of this matter.

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where the legal question has arisen and, thus, are trained in that state's law. That situation is not present here where neither the district judge who originally heard this case nor any member of this appellate court is a South Carolina jurist. By bringing this case in federal court and proceeding against a broad range of commercial defendants thereby compelling the recusal of many members of this Court, the Catawbas have managed to have their state law case decided by a court with substantially reduced familiarity with South Carolina law.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

October Term, 1985

SOUTH CAROLINA et al., Petitioners

v.

CATAWBA INDIAN TRIBE, INC.

476 US 498, 90 L Ed 2d 490, 106 S Ct 2039

[No. 84-782]

Argued December 12, 1985. Decided June 2, 1986.

APPEARANCES OF COUNSEL

James D. St. Clair argued the cause for petitioners. **Don Brantley Miller** argued the cause for respondent. Briefs of Counsel, p 1104, infra.

OPINION OF THE COURT

Justice **Stevens** delivered the opinion of the Court.

At issue in this litigation is the right to possession of a "Tract of Land of Fifteen Miles square" described in a 1763 treaty between the King of England and the Catawba Head Men and Warriors.[1] The tract, comprising

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[1] The 1763 Treaty of Fort Augusta was entered into by the Catawbas and British and colonial officials, and provides, in relevant part:

"And We the Catawba Head Men and Warriors in Confirmation of an Agreement heretofore entered into with the White People declare that we will remain satisfied with the Tract of Land of Fifteen Miles square a Survey of which by our consent and at our request has been already begun and the respective Governors and Superintendent on their Parts promise and engage that

144,000 acres and 225 square miles, is located near the northern border of South Carolina; some 27,000 persons now claim title to different parcels within the tract. The specific question presented to us is whether the State's statute of limitations applies to the Tribe's claim. The answer depends on an interpretation of a statute enacted by Congress in 1959 to authorize a division of Catawba tribal assets. See 25 USC §§ 931-938 [25 USCS §§ 931-938]. We hold that the State's statute applies, but we do not reach the question whether it bars the Tribe's claim.

Simply stated, the Tribe[2] claims that it had undisputed ownership and possession of the land before the first Nonintercourse Act was passed by Congress in 1790;[3] that the Nonintercourse Act prohibited any conveyance of tribal land without the consent of the United States; and that the United States never gave its consent

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the aforesaid survey shall be compleated and that the Catawbas shall not in any respect be molested by any of the King's subjects within the said Lines but shall be indulged in the usual Manner of hunting Elsewhere." XI Colonial Records of North Carolina 201-202 (1763), reprinted in App 35.

[2] The respondent, Catawba Indian Tribe, Inc., is a nonprofit corporation organized under the laws of South Carolina in 1975. Like the District Court and the Court of Appeals, we assume that the respondent is the successor in interest of the Catawba Indian Tribe of South Carolina. For convenience, we refer to the respondent as the "Tribe" throughout this opinion.

[3] See Act of July 22, 1790, ch 33, § 4, 1 Stat. 138. The Act, now codified at 25 USC § 177 [25 USCS § 177], states in relevant part: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

to a conveyance of this land. Accordingly, the Tribe's purported conveyance to South Carolina in 1840 is null and void. Among the defenses asserted by petitioners[4] is the contention that, even if the Tribe's claim was valid before passage and enactment of the Catawba Division of Assets Act, § 5 of the Act made the state statute of limitations applicable to the claim. Because that is the only contention that we review, it is not necessary to describe much of the historical material in the record.

I.

In 1760 and 1763, the Tribe surrendered to Great Britain its aboriginal territory in what is now North and South Carolina in return for the right to settle permanently on the "Tract of Land of Fifteen Miles square" that is now at issue. For purposes of this summary judgment motion, it is not disputed that the Tribe retained title to the land when the Nonintercourse Acts were passed.

By 1840, the Tribe had leased most, if not all, of the land described in the 1763 treaty to white settlers. In 1840, the Tribe conveyed its interest in the "Tract of Land of Fifteen Miles square" to the State of South Carolina by entering into the "Treaty of Nation Ford." In that treaty, the State agreed, in return for the "Tract," to spend $5,000 to acquire a new reservation, to pay the Tribe $2,500 in advance, and to make nine annual payments of $1,500 in

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[4] The petitioners include the State of South Carolina and approximately 76 other parties who are named as defendants in the complaint; they were sued as representatives of a class that was alleged to consist of the approximately 27,000 persons who claim an interest in the disputed land.

the ensuing years. In 1842, the State purchased a 630-acre tract as a new reservation for the Tribe, which then apparently had a membership of about 450 persons.[5] This land is still held in trust for the Tribe by South Carolina.

The Tribe contends that the State did not perform its obligations under the treaty – it delayed the purchase of the new reservation for over 2½ years; it then spent only $2,000 instead of $5,000 to purchase the new land; and it was not actually "new" land because it was located within the original 144,000-acre tract. Still more importantly, as noted, the Tribe maintains that this entire transaction was void because the United States did not consent to the conveyance as required by the Nonintercourse Act.

At various times during the period between 1900 and 1943, leaders of the Tribe applied to the State for citizenship and for a "final settlement of all their claims against the State."[6] Petitioners argue that these claims merely sought full performance of the State's obligations under the 1840 treaty, but, for purposes of our decision, we accept the Tribe's position that it was then asserting a claim under the Nonintercourse Acts and thus challenging the treaty itself. In any event, both state officials and representatives of the Federal Government took an interest in the plight of the Tribe.[7]

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[5] An 1825 War Department chart indicated that the Catawbas totaled 450 persons. 2 American State Papers 545 (1925).

[6] See 1920 SC acts 1700, Joint Res No. 904, § 1.

[7] In 1930, a Subcommittee of the Senate Committee on Indian Affairs held hearings in Rock Hill, South Carolina, which is located in the 144,000-acre tract. Senator Thomas of Oklahoma wrote that the "subcommittee . . . found some hundred

In response to this concern, on December 14, 1943, the Tribe, the State, and the Office of Indian Affairs of the Department of the Interior entered into a Memorandum of Understanding which was intended to provide relief for the Tribe, but which did not require the Tribe to release its claims against the State.[8] Pursuant to that agreement, the State purchased 3,434 acres of land at a cost of $70,000 and conveyed it to the United States to be held in trust for the Tribe.[9] The Federal Government agreed to make annual contributions of available sums for the welfare of the Tribe and to assist the Tribe with education, medical benefits, and economic development. For its part, the Tribe agreed to conduct its affairs on the basis of the Federal Government's recommendations; it

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and seventy-five remnants of this band located on a tract of practically barren rock and gradually starving to death." Division of Tribal Assets of Catawba Indian Tribe, Hearings on HR 6128, before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 86th Cong. 1st Sess (unpublished), Insert 5, at 3 (Minutes of State and Federal Conference, Oct. 21, 1958) (6 Record Ex 56), quoting Feb. 10, 1932, letter, Senator Thomas to Commissioner Rhoads.

[8] Preliminary drafts of the Memorandum of Understanding contained a provision extinguishing the Tribe's reservation claim (6 Record Ex 49), but that provision was deleted. The Solicitor of the Department of the Interior emphasized that the agreement should not use "a contract under the Johnson-O'Malley Act in order to deprive the Indian tribe of claims which it might be able to enforce in the courts." United States Department of the Interior, Office of the Solicitor, Memorandum for the Commissioner of Indian Affairs. Id., Ex 50, p 3.

[9] The State also agreed to appropriate at least $9,500 annually for three years for the benefit of the Tribe and to extend to Catawbas the rights and privileges of all citizens, including admission to public schools. Ibid.

thereafter adopted a constitution approved by the Secretary of the Interior pursuant to the Indian Reorganization Act, 25 USC § 476 [25 USCS § 476].

In 1953, Congress decided to make a basic change in its policies concerning Indian affairs. The passage of House Concurrent Resolution 108 on August 1, 1953,[10] marked the beginning of the "termination era" – a period that continued into the mid-1960s, in which the Federal Government endeavored to terminate its supervisory responsibilities for Indian tribes.[11] Pursuant to that policy, the Federal Government identified the Catawba Tribe as a likely candidate for the withdrawal of federal

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[10] That Resolution declared: "[I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship." HR Con Res 108, 83d Cong, 1st Sess (1953), 67 Stat B132.

[11] According to one compilation, between 1954 and 1962, Congress passed 12 separate "Termination Acts," the 11th of which was the Catawba Act. See F. Prucha, The Great Father 1048 (1984). The termination policy has been criticized by various commentators. See, e. g., Cornell, The New Indian Politics, 10 Wilson Q 113, 121 (1986); F. Prucha, supra, at 1046-1059; Wilkinson & Biggs, The Evolution of the Termination Policy, 5 American Indian L Rev 139 (1977); Preloznik & Felsenthal, The Menominee Struggle to Maintain Their Tribal Assets and Protect Their Treaty Rights Following Termination, 51 NDL Rev 53 (1975). The ultimate legislative wisdom of the termination policy is, of course, not before the Court.

services.[12] Moreover, members of the Tribe desired an end to federal restrictions on alienation of their lands in order to facilitate financing for homes and farm operations.[13] Accordingly, after discussions with representatives of the Bureau of Indian Affairs in which leaders of the Tribe were assured that any claim they had against the State would not be jeopardized by legislation terminating federal services, the Tribe adopted a resolution supporting such legislation and authorizing a distribution of tribal assets to the members of the Tribe.[14] After receiving advice that the Tribe supported legislation

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[12] In September 1954, a House Study Subcommittee on Indian Affairs reported that the Catawba Tribe was one of the groups able to take responsibility for their affairs and therefore was ready for termination of federal services. HR Rep No. 2680, 83d Cong, 2d Sess, 2-3 (1954). In contrast to the report made by Senator Thomas in 1930, n 7, supra, the Reports accompanying the Act concluded that the Catawbas had been able to merge into the general community and had been able to attain an economic position comparable to that of non-Indians. See S Rep No. 863, 86th Cong, 1st Sess, 3 (1959) ("The Catawba Indians have advanced economically . . . during the past 14 years, and have now reached a position that is comparable to their non-Indian neighbors"); HR Rep No. 910, 86th Cong, 1st Sess, 2 (1959) (same). Most adult male Catawbas were employed at the time: 47% were in industry, 20% in skilled labor, 7% in the Armed Services, 15% in odd jobs, 5% retired, and 6% on the welfare rolls. S Rep, at 4; HR Rep, at 5.

[13] See 105 Cong Rec 5462 (1959) (statement of Rep. Hemphill); App 102.

[14] The resolution adopted at the meeting of the Tribe on January 3, 1959, expressly noted that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." Id., at 103.

authorizing the disposal of the tribal assets and terminating federal responsibility for the Tribe and its individual members, Congress enacted the Catawba Indian Tribe Division of Assets Act, 73 Stat 592, 25 USC §§ 931-938 [25 USCS §§ 931-938]. The Act provides for the preparation of a tribal membership roll, § 931; the tribal council's designation of sites for church, park, playground, and cemetery purposes, § 933(b); and the division of remaining assets among the enrolled members of the Tribe, § 933(f). The Act also provides for the revocation of the Tribe's Constitution and the termination of federal services for the Tribe, § 935. It explicitly states that state laws shall apply to members of the Tribe in the same manner that they apply to non-Indians. Ibid. Pursuant to that Act, the 3,434-acre reservation that had been acquired as a result of the 1943 Memorandum of Understanding was distributed to the members of the Tribe; the Secretary of the Interior revoked the Tribe's Constitution, effective July 1, 1962.

In 1980, the Tribe commenced this action seeking possession of the 225-square-mile tract and trespass damages for the period of its dispossession. All of the District Judges for the District of South Carolina recused themselves, and Judge Willson of the Western District of Pennsylvania was designated to try the case. After the development of a substantial record of uncontested facts, Judge Willson granted the petitioners' motion for summary judgment. His order of dismissal was initially reversed by a panel of the Court of Appeals for the Fourth Circuit, 718 F2d 1291 (1983); sitting en banc, the full Court of Appeals adopted the panel's opinion. 740 F2d 305 (1984). Because of the importance of the case, we

requested the views of the Solicitor General of the United States and granted certiorari, 471 US 1134, 86 L Ed 2d 691, 105 S Ct 2672 (1985). We now reverse.

II.

Section 5 of the Catawba Act is central to this dispute. As currently codified, it provides:

> "The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in this subchapter, however, shall affect the status of such persons as citizens of the United States." 25 USC § 935 [25 USCS § 935].

This provision establishes two principles in unmistakably clear language. First, the special federal services and statutory protections for Indians are no longer applicable to the Catawba Tribe and its members. Second, state laws apply to the Catawba Tribe and its members in precisely the same fashion that they apply to others.

The Court of Appeals disagreed with this reading of the Act. For it concluded that the word "them" in the second sentence of § 5 could refer to the individual

Indians who are members of the Tribe and not encompass the Tribe itself. Relying on the canon that doubtful expressions of legislative intent must be resolved in favor of the Indians,[15] it thus held that the language in § 5 about the inapplicability of federal Indian statutes and the applicability of state laws did not reach the Tribe itself.

The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.[16] It seems clear to us that the antecedent of the words "them" and "their" in the second sentence of § 5 is

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[15] DeCoteau v District County Court, 420 US 425, 444, 43 L Ed 2d 300, 95 S Ct 1082 (1975); Antoine v Washington, 520 US 194, 199-200, 43 L Ed 2d 129, 95 S Ct 944 (1975); Mattz v Arnett, 412 US 481, 504-505, 37 L Ed 2d 92, 93 S Ct 2245 (1973).

[16] See Oregon Dept. of Fish and Wildlife v Klamath Indian Tribes, 473 US 753, 774, 87 L Ed 2d 542, 105 S Ct 3420 (1985) ("[E]ven though 'legal ambiguities are resolved to the benefit of the Indians,' DeCoteau v District County Court, 420 US 425, 447 [43 L Ed 2d 300, 95 S Ct 1082] (1975), courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' Washington v Washington Commercial Passenger Fishing Vessel Assn. 443 US [658, 673 [61 L Ed 2d 823, 99 S Ct 3055] (1979)], clearly runs counter to a tribe's later claims"); Rice v Rehner, 463 US 713, 732, 77 L Ed 2d 961, 103 S Ct 3291 (1983) (canon of construction regarding certain Indian claims should not be applied "when application would be tantamount to a formalistic disregard of congressional intent"); Andrus v Glover Construction Co. 446 US 608, 618-619, 64 L Ed 2d 548, 100 S Ct 1905 (1980); DeCoteau v District County Court, 420 US, at 447, 43 L Ed 2d 129, 95 S Ct 944 ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent").

the compound subject of the first clause in the sentence, namely, "the tribe and its members." To read the provision otherwise is to give it a contorted construction that abruptly divorces the first clause from the second and the third, and that conflicts with the central purpose and philosophy of the Termination Act. According the statutory language its ordinary meaning, moreover, is reinforced by the fact that the first sentence in the section provides for a revocation of the Tribe's Constitution. It would be most incongruous to preserve special protections for a tribe whose constitution has been revoked while withdrawing protection for individual members of that tribe.[17]

Without special federal protection for the Tribe, the state statute of limitations should apply to its claim in this case. For it is well established that federal claims are subject to state statutes of limitations unless there is a federal statute of limitations or a conflict with federal policy.[18] Although federal policy may preclude the ordinary applicability of a state statute of limitations for this

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[17] Respondent argues that the scope of the Act was merely to terminate the specific federal services arising from the 1943 Memorandum of Understanding. Such a limited interpretation cannot be reconciled with the broader language of the Act ("The tribe and its members shall not be entitled to *any* of the special services performed by the United States for Indians because of their status as Indians"; "*all* statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them"; "the laws of the several states shall apply to them *in the same manner* they apply to other persons or citizens within their jurisdiction") (emphasis added).

[18] See, e. g., Wilson v Garcia, 471 US 261, 266-267, 85 L Ed 2d 254, 105 S Ct 1938 (1985); Board of Regents v Tomanio, 446 US 478, 483-484, 64 L Ed 2d 440, 100 S Ct 1790 (1980); Johnson v

type of action in the absence of a specific congressional enactment to the contrary, County of Oneida v. Oneida Indian Nation, 470 US 226, 84 L Ed 2d 169, 105 S Ct 1245 (1985), the Catawba Act clearly suffices to reestablish the usual principle regarding the applicability of the state statute of limitations. In striking contrast to the situation in County of Oneida, the Catawba Act represents an explicit redefinition of the relationship between the Federal Government and the Catawbas; an intentional termination of the special federal protection for the Tribe and its members; and a plain statement that state law applies to the Catawbas as to all "other persons or citizens."

That the state statute of limitations applies as a consequence of terminating special federal protections is also supported by the significance we have accorded congressional action redefining the federal relationship with particular Indians. We have long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims.[19]

Railway Express Agency, Inc. 421 US 454, 462, 44 L Ed 2d 295, 95 S Ct 1716 (1975); Auto Workers v Hoosier Cardinal Corp. 383 US 696, 703-704, 16 L Ed 2d 192, 86 S Ct 1107 (1966); Cope v Anderson, 331 US 461, 463, 91 L Ed 1602, 67 S Ct 1340 (1947); Rawlings v Ray, 312 US 96, 97, 85 L Ed 605, 61 S Ct 473 (1941); O'Sullivan v Felix, 233 US 318, 322-323, 58 L Ed 980, 34 S Ct 596 (1914); Chattanooga Foundry & Pipe Works v Atlanta, 203 US 390, 397-398, 51 L Ed 241, 27 S Ct 65 (1906); McClaine v Rankin, 197 US 154, 158, 49 L Ed 702, 25 S Ct 410 (1905); Campbell v Haverhill, 155 US 610, 617, 39 L Ed 280, 15 S Ct 217 (1895); M'Cluny v Silliman, 3 Pet US 270, 277, 7 L Ed 676 (1830).

[19] See, e.g., Larkin v Paugh, 276 US 431, 439, 72 L Ed 640, 48 S Ct 366 (1928) ("With the issue of the patent, the title not only passed from the United States but the prior trust and the inci-

Similarly, we have emphasized that Termination Acts subject members of the terminated tribe to "the full sweep of states laws and state taxation."[20] These

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dental restrictions against alienation were terminated. This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction – so that thereafter all questions pertaining to the title were subject to examination and determination by the courts, appropriately those in Nebraska, the land being there"); Dickson v Luck Land Co. 242 US 371, 375, 61 L Ed 371, 37 S Ct 167 (1917) ("With those restrictions [of congress] entirely removed and the fee simple issued it would seem that the situation was one in which all questions pertaining to the disposal of the lands naturally would fall within the scope and operation of the laws of the State"); United States v Waller, 243 US 452, 461-462, 61 L Ed 843, 37 S Ct 430 (1917) ("We cannot escape the conviction that the plain language of this act evidences the intent and purpose of Congress to make such lands allotted to mixed-blood Indians subject to alienation with all the incidents and rights which inhere in full ownership in persons of full capacity"); Shrimpscher v Stockton, 183 US 290, 296, 46 L Ed 203, 22 S Ct 107 (1902) (after a treaty removed restraints from alienation of land by certain Wyandotte Indians, state statute of limitations ran against Indians, even though Indians later asserted claim of a prior federal treaty violation; after removal of restraints on alienation, the Indian's heirs "were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands").

[20] Bryan v Itasca County, 426 US 373, 389, 48 L Ed 2d 710, 96 S Ct 2102 (1976). See also United States v Antelope, 430 US 641, 647, n 7, 51 L Ed 2d 701, 97 S Ct 1395 (1977) ("[M]embers of tribes whose official status has been terminated by congressional enactment are no longer subject, by virtue of their status, to federal criminal jurisdiction under the Major Crimes Act"); Affiliated Ute Citizens v United States, 406 US 128, 31 L Ed 2d 741, 92 S Ct 1456 (1972) (terminated members of Tribe must bring action to invalidate allegedly fraudulent conveyance under same laws as other citizens).

principles reflect an understanding that congressional action to remove restraints on alienation and other federal protections represents a fundamental change in federal policy with respect to the Indians who are the subject of the particular legislation.

The Court of Appeals found support for its conclusion about the nonapplicability of the state statute of limitations in § 6 of the Catawba Act, which provides that nothing in the statute affects the rights of the Tribe under the laws of South Carolina.[21] The thrust of the Court of Appeals' reasoning was that, if a state law was inapplicable to the Tribe or its members before the effective date of the Act, its application after the effective date necessarily violates § 6. But such a reading contradicts the plain meaning of § 5's reference to the applicability of state laws. In our view § 6 was merely intended to remove federal obstacles to the ordinary application of state law.

As the Court of Appeals noted, in Menominee Tribe v United States, 391 US 404, 20 L Ed 2d 697, 88 S Ct 1705 (1968), the Court concluded that the Menominee Termination Act did not terminate the Tribe's hunting and fishing rights. The Court emphasized that the Termination Act must be read in pari materia with an Act passes [sic] in the same Congress that preserved hunting and fishing rights. Id., at 411, 20 L Ed 2d 697, 88 S Ct 1705. In this case, of course, there is no similar contemporaneous statute. Moreover, in Menominee, the Court was concerned about a "backhanded" abrogation of treaty rights, id., at 412, 20 L Ed 2d 697, 88 S Ct 1705; no comparable abrogation is at issue here.

[21] As currently codified, § 6 provides:
"Nothing in this subchapter shall affect the rights, privileges, or obligations of the tribe and its members under the laws of South Carolina." 25 USC § 936 [25 USCS § 936].

Section 6 cannot be read to preserve, of its own force, a federal tribal immunity from otherwise applicable state law without defeating a basic purpose of the Act and negating explicit language in § 5.[22] Most fundamentally, § 6 simply does not speak to the explicit redefinition of the federal relationship with the Catawbas that is the basis for the applicability of the state statute of limitations.

Finally, the Court of Appeals relied heavily on the assurance to the Tribe that the status of any claim against South Carolina would not be affected by the legislation.[23] Even assuming that the legislative provisions are sufficiently ambiguous to warrant reliance on the legislative history, we believe that the Court of Appeals misconceived the import of this assurance. We do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute became effective. Rather, we assume that the status of the claim remained exactly the same immediately

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[22] It is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." Colautti v Franklin, 439 US 379, 392, 58 L Ed 2d 596, 99 S Ct 675 (1979). See also Mountain States Tel. & Tel. Co. v Pueblo of Santa Ana, 472 US 237, 249, 86 L Ed 2d 475, 105 S Ct 2109 (1985); United States v Menasche, 348 US 528, 538-539, 99 L Ed 615, 75 S Ct 513 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' Montclair v Ramsdell, 107 US 147, 152 [27 L Ed 431, 2 S Ct 391], rather than to emasculate an entire section").

[23] See 718 F2d 1291, 1296 (1983) (quoting Bureau of Indian Affairs official's assurance that " 'any claim the Catawbas had against the State would not be jeopardized by carrying out a program with the Federal Government' ").

before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction. As a result, unlike the Court of Appeals, we perceive no contradiction between the applicability of the state statute of limitations and the assurance that the status of any state claims would not be affected by the Act.

We thus conclude that the explicit redefinition of the federal relationship reflected in the clear language of the Catawba Act requires the application of the state statute of limitations to the Tribe's claim.

III

The District Court held that respondent's claim is barred by the South Carolina statute of limitations. The Court of Appeals' construction of the 1959 federal statute made it unnecessary for that court to review the District Court's interpretation of state law. Because the Court of Appeals is in a better position to evaluate such an issue of state law than we are,[24] we remand the case to that court for consideration of this issue.

It is so ordered.

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[24] See Pembaur v Cincinnati, 475 US 469, 484-485, n 13, 89 L Ed 2d 452, 106 S Ct 1292 (1986); Regents of University of Michigan v Ewing, 474 US 214, 224, n 10, 88 L Ed 2d 523, 106 S Ct 507 (1985); Bishop v Wood, 426 US 341, 345-347, 48 L Ed 2d 684, 96 S Ct 2074 (1976); Propper v Clark, 337 US 472, 486-487, 93 L Ed 1480, 69 S Ct 1333 (1949).

SEPARATE OPINION

Justice Blackmun, with whom Justice Marshall and Justice O'Connor join, dissenting.

The Catawba Indian Tribe Division of Assets Act, 73 Stat 592, 25 USC § 931 et seq. [25 USCS §§ 931 et seq.], was passed by Congress in 1959 to divide up the Tribe's federally supervised reservation so that individual Catawbas could sell or mortgage their allotments. The Court today concludes that the Act also had the incidental effect of applying a South Carolina statute of limitations to the Catawbas' pre-existing and longstanding claim to lands the State purported to purchase from the Tribe in 1840. I feel this interpretation cannot be reconciled with the language of the Act under this Court's traditional approach to statutes regulating Indian affairs. I therefore dissent.

I

Too often we neglect the past. Even more than other domains of law, "the intricacies and peculiarities of Indian law deman[d] an appreciation of history." Frankfurter, Foreward to A Jurisprudential Symposium in Memory of Felix S. Cohen, 9 Rutgers L Rev 355, 356 (1954).

Before the arrival of white settlers, the Catawba Indians occupied much of what is now North and South Carolina. In the 1760 Treaty of Pine Tree Hill, the Catawbas relinquished the bulk of their aboriginal territory to Great Britain in exchange for assurances that they would be allowed to live in peace on a small portion of that

territory, a square of land 15 miles on each side (144,000 acres), which today surrounds and includes Rock Hill, S. C. Three years later, in the Treaty of Augusta, the Tribe again agreed to "remain satisfied with the Tract of Land of Fifteen Miles square," and the British once more promised that "the Catawba shall not in any respect be molested by any of the King's subjects within the said Lines." App 35. It is the 144,000 acres reserved for the Catawbas in 1760 and again in 1763 – "a mere token of the[ir] once large domain" – that give rise to this litigation. See J. Brown, The Catawba Indians 8 (1966) (Brown).

The historical record suggests that the Catawbas were driven to the agreements of 1760 and 1763 in large part by the colonists' repeated and continuing encroachments on tribal lands.[1] Some of the land was acquired by purchase, see, e.g., id., at 165, but in South Carolina, as elsewhere, "[f]rom the very beginning abuses marred the transfer of land titles from the Indians to individuals among the English colonists." F. Prucha, American Indian

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[1] In letters written in 1754 to the Catawbas and to the President of the Council of North Carolina, Governor Glen of South Carolina noted that the Catawbas repeatedly had complained about whites' settling too close to them. 6 Record, Exs 1 and 2. In response to these complaints, Governor Glen forbade whites to settle within 30 miles of Catawba towns, ibid., but that prohibition was frequently ignored. See C. Hudson, The Catawba Nation 49 (1970). For general discussions of early colonial encroachments on Catawba land, see Brown, at 163-166; P. Dammann, D. Miller, & D. Israel, A History of the Catawba Tribe and its Reservation Lands, reprinted in Settlement of the Catawba Indian Land Claims, Hearing before the House Committee on Interior and Insular Affairs on HR 3274, 96th Cong, 1st Sess, 135, 151-153 (1979) (Hearing).

Policy in the Formative Years 6 (1962). Indeed, the South Carolina Provincial Council took legislative notice in a 1739 statute that lands purchased from Indians were "generally obtained . . . by unfair representations, fraud and circumvention, or by making them gifts or presents of little value, by which practices, great resentments and animosities have been created amongst the Indians toward the inhabitants of this Province." An Act to restrain and prevent the purchasing Lands from Indians, 1 The First Laws of the State of South Carolina 160-161 (J. Cushing ed 1981). The 1739 statute therefore barred the private acquisition of Indian lands without a grant or license from the Crown or the Governor, but such steps apparently did little to stop white encroachments on Indian territory. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 U Maine L Rev 17, 21 (1979). Recognizing that "great frauds and abuses have been committed in the purchasing lands of the Indians," the Crown in October 1763 – shortly before the signing of the Treaty of Augusta – flatly forbade any further private purchases of land reserved for Indian tribes. Proclamation of 1763, reprinted in 3 W. Washburn, The American Indian and the United States 2135, 2138 (1973).

The United States from an early date followed a similar policy. Since 1790, the Nonintercourse Act, now codified as reenacted and amended at 25 USC § 177 [25 USCS § 177], has broadly prohibited the sale of Indian land without the consent of the Federal Government. Despite this prohibition – which in 1793 was extended to include not only outright purchases but also acquisitions

of any "claim" to protected lands, see Act of Mar. 1, 1793, § 8, 1 Stat 330 – mounting pressures from settlers in the early 19th century led the State of South Carolina to enact a series of statutes purporting to authorize the leasing of Catawba lands to non-Indians. Initially, the leases signed under these statutes seem to have posed little threat to the Tribe. According to B. S. Massey, who knew the Catawbas during this time and later served as South Carolina's agent to the Tribe, "[t]hey were then strong and felt themselves in their own greatness, governed by their own laws, working the best spots of their lands and leasing out the poorer portions to the white men." Report to The Governor of South Carolina on the Catawba Indians 4 (1854), reprinted in 6 Record, Ex 11.

By the 1830's, however, nearly all of the 144,000 acres reserved for the Tribe in the Treaty of Augusta had been leased to non-Indians. This situation proved disastrous, because rents were "generally paid in old horses, old cows or bed quilts and clothes, at prices that the whites set on the articles taken." Ibid. The Catawbas soon were reduced to "a state of starvation and distress," ibid., and they ultimately gave in to repeated efforts by the State to purchase their land. In 1840, representatives of the Tribe and the State signed the Treaty of Nation Ford. Under this "treaty" – which the United States never joined or approved – the Catawbas relinquished all their land in exchange for two promises. First, the State promised the sum of $16,000 in a series of resettlement payments. Second, the State pledged that it would purchase a new reservation "of the value of five thousand dollars,"

including 300 acres of "good arable lands fit for cultivation" in a thinly populated area of North or South Carolina satisfactory to the Indians. App 38-39.[2]

The South Carolina Legislature promptly provided for the transfer of title from the State to the lessees of the 144,000 acres, requiring only that the lessees reimburse the State proportionately for its advances to the Tribe. Act of Dec. 18, 1840, § 3, 7 SC Stats 103 (1840). Unfortunately, the State showed less enthusiasm in fulfilling its contractual obligations to the Indians. After allowing the Catawbas to wander homeless and uncompensated for 2½ years, the State reportedly spent $2,000 to buy back 630 agriculturally undesirable acres of the Catawbas' original 18th century treaty lands as a "new" reservation for the Tribe.[3] The State continues to hold these 630 acres for the

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[2] According to Massey, the Indians "were driven to" this agreement "by being surrounded by white men, [who] cheat[ed] them out of their rights, and [by] partaking of the vices of the whites and but few of their virtues." Report to The Governor of South Carolina on the Catawba Indians 5 (1854), reprinted in 6 Record, Ex 11. The "vices" to which Massey referred may have included the consumption of alcohol; the Catawbas later charged that state representatives negotiated the treaty by setting out a whiskey barrel and tin cups and inviting the Indians to help themselves. This charge was reported to the Department of the Interior in a 1908 memorandum by Catawba tribal attorney Chester Howe. See Plaintiffs' Response to Defendants' Motion to Dismiss in No. 80-2050-6 (CA4) p 23, n 30, citing Record Group 75, National Archives Central Files 1907-1939, BIA File No. 1753-1906.

[3] See Brown, at 317, 320-322. Assuming this account is correct, the new reservation was less than one-half of one percent of the Tribe's 1763 treaty lands. The price paid by the State for the new reservation – which works out to roughly $3.17

Catawbas. It is unclear from the record before us whether the Tribe ever received the resettlement payments promised by the State.

In the 146 years that have passed since the Nation Ford agreement, the Catawbas repeatedly have pressed their claim to the 144,000 acres, which they feel were taken from them illegally. In the early 1900's, the Tribe petitioned both the Federal Government and the State of South Carolina for relief, arguing that the 1840 transfer was void because the United States had not approved it. The Commissioner of Indian Affairs advised the Catawbas in 1906 and again in 1909 that the Department of the Interior would not seek relief on their behalf. He explained that the Catawbas were "state Indians" for whom the United States had no responsibility, and, consequently, that the absence of federal participation in the Treaty of Nation Ford did not void the transaction.[4] In 1908, the South Carolina Attorney General reached the same conclusion, and advised the state legislature that

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per acre – contrasts strikingly with the price paid for the same land when purchased from the Indians 2½ years earlier – the approximate equivalent of 15 cents per acre payable in installments over 10 years.

[4] 6 Record, Exs 18, 20. But see United States v Candelaria, 271 US 432, 442, 70 L Ed 1023, 46 S Ct 561 (1926) (construing the term "Indian Tribe" in the Nonintercourse Act to refer to any " 'body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory,' " quoting Montoya v United States, 180 US 261, 266, 45 L Ed 521, 21 S Ct 358 (1901); Joint Tribal Council of Passamaquoddy Tribe v Morton, 528 F2d 370, 376-378 (CA1 1975) (applying Nonintercourse Act to Tribe lacking federal recognition.)

the Tribe had no outstanding claim to any of the 144,000 acres. 1908 Op SC Atty Gen 17, 18, 29-32. The Tribe nonetheless continued to press its claim to the land. A federal Indian agent visiting the Catawbas in December 1910, for example, was asked about the Tribe's prospects for recovering "their old reservation of 15 miles square"; he told them the Department of the Interior would not take their case into court. 6 Record, Ex 21, pp 11-12 (letter from C. Davis to Comm'r of Indian Affairs, Jan. 5, 1911).

The seeds of the legislation found dispositive by the Court today were planted in 1943, when the Tribe, the State of South Carolina, and the Department of the Interior concluded a Memorandum of Understanding providing for a new reservation for the Catawbas, and placing the Tribe and the new reservation under federal supervision. Evidently concerned about the Tribe's continued grievances concerning the 1840 agreement, South Carolina sought, unsuccessfully, to include in the Memorandum a waiver of any outstanding claims the Catawbas had against the State. Id., Ex 48 (letter from Ass't Comm'r of Indian Affairs to SC State Auditor, Aug. 28, 1941). Preliminary drafts of the Memorandum included such a waiver, see id., Ex 49, p 5, but federal officials ultimately dropped the provision because they doubted the legality of using the agreement to deprive the Indians of claims that otherwise might be enforceable in court, see App 43-44 (memorandum from Interior Dept. Solicitor to Comm'r of Indian Affairs, Jan. 13, 1942).

In 1958, after representatives from the Bureau of Indian Affairs suggested to the Catawbas that their financial difficulties could be alleviated by distributing the Tribe's federally supervised assets and ending federal

restrictions on alienation, the Indians expressed concern about their claims against the State, but they were assured that the proposal would not jeopardize those claims. 6 Record, Ex 53, pp 7-8 (memorandum from program officer to Tribal Programs Branch Chief, Jan. 30, 1959) (quoted by the Court, ante, at 510, n 23, 90 L Ed 2d, at 501). The Tribe then adopted a resolution calling on its Congressman, Robert Hemphill, to introduce and secure passage of legislation to remove restraints on alienation and to distribute tribal assets; the resolution specifically requested, however, that "nothing in this legislation shall affect the status of any claim against the State of South Carolina by the Catawba Tribe." App 103.

Representative Hemphill asked the Bureau of Indian Affairs to draft legislation "to accomplish the desires set forth in the Resolution." Id., at 50. He then presented the draft bill to the Catawbas and told them that it had been "drawn up to carry out the intent of the resolution." Id., at 111. After a majority of the Tribe expressed approval, Representative Hemphill introduced the bill in Congress, explaining that the Tribe had given its consent. See 105 Cong Rec 5462 (1959). The result was the 1959 Division of Assets Act, which the Court today concludes may bar the Tribe from pursuing its claim to the lands reserved for it in 1760 and 1763.

In the 1970's, spurred by favorable legal rulings elsewhere in the country, Catawba leaders renewed their request to the Department of the Interior to seek relief for the Tribe. In 1977, the Solicitor of the Department concluded that the rebuffs given the Catawbas in 1906 and 1909 had been legally unjustified, and that the Tribe could establish a prima facie claim to the 144,000 acres. He

further concluded that the Division of Assets Act operated prospectively only, and did not affect pre-existing rights. Accordingly, the Solicitor formally requested the Department of Justice to institute legal action on behalf of the Catawbas and to support the settlement discussion that the Tribe already had initiated with South Carolina officials. See App to Brief in Opposition 3a. The litigation request was later withdrawn in an effort to emphasize that the Interior Department favored a negotiated settlement if at all possible, and settlement legislation backed by the Tribe was introduced in Congress. See Hearing, at 15-17 (Hearing) (statement of Leo M. Krulitz, Solicitor of the Department of the Interior). The legislative efforts apparently proved fruitless, and in October 1980 the Tribe filed this suit.

II

The Tribe's complaint asserts a right to possession of the reserved portion of its aboriginal territory under the Nonintercourse Act, the Federal Constitution, and the treaties of 1760 and 1763.[5] These are federal claims, see Oneida Indian Nation v County of Oneida, 414 US 661,

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[5] Although the complaint asks in part that the Tribe "be restored to immediate possession" of virtually the entire 144,000 acres, App 25, the available remedies, even if the Tribe prevailed, well might be limited by equitable considerations. See Yankton Sioux Tribe v United States, 272 US 351, 357, 71 L Ed 294, 47 S Ct 142 (1926). The question currently before the Court, of course, is not whether part or all of the land claimed by the Catawbas should be given back to them, but whether the Tribe's ability to seek any judicial relief at all is governed by South Carolina's statute of limitations.

666-678, 39 L Ed 2d 73, 94 S Ct 772 (1974) (Oneida I), and the statute of limitations is thus a matter of federal law, see County of Oneida v Oneida Indian Nation, 470 US 226, 240-244, 84 L Ed 2d 169, 105 S Ct 1245 (1985) (Oneida II). Where, as here, Congress has not specified a statute of limitations, federal courts generally borrow the most closely analogous limitations period under state law, but *only* if application of the state limitations period would not frustrate federal policy. See, e.g., Wilson v Garcia, 471 US 261, 266-267, 85 L Ed 2d 254, 105 S Ct 1938 (1985); DelCostello v Teamsters, 462 US 151, 158-163, 76 L Ed 2d 476, 103 S Ct 2281 (1983); Occidental Life Ins. Co. v. EEOC, 432 US 355, 367, 53 L Ed 2d 402, 97 S Ct 2447 (1977).

In Oneida II, the Court recognized that application of state statutes of limitations to Indian land claims generally *would* violate federal policy. The Court noted that a 1950 federal statute giving New York courts jurisdiction over most civil disputes involving Indians had been carefully crafted to exempt pre-existing land claims from the operation of a New York statute of limitations. See Act of Sept. 13, 1950, 64 Stat 845, 25 USC § 233 [25 USCS § 233]. Furthermore, in a later series of more general enactments imposing a federal statute of limitations on certain tort and contract actions brought anywhere in the United States by Indians or by the United States on behalf of Indians, Congress specifically excluded from the limitations period all actions "to establish the title to, or right of possession of, real or personal property." 28 USC § 2415(c) [28 USCS § 2415(c)].[6] The Court in Oneida II

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[6] The federal statute of limitations for certain tort and contract actions brought by the United States on behalf of Indian

concluded that the text and legislative history of these statutes evinced a congressional belief that actions brought to enforce Indian property rights were not, and should not be, subject to filing deadlines other than those

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Tribes was first adopted in 1966; the limitations period was not applied to suits brought by Indians themselves until 1982. "In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of the Indians." Oneida II, 470 US, at 242, 84 L Ed 2d 169, 105 S Ct 1245. The debates over these amendments to § 2415 indicate that Congress extended the filing deadline in part to allow additional time for preparation and negotiation of tort claims for trespass damages arising from allegedly illegal expropriations of tribal lands – including the 144,000 acres claimed by the Catawbas. See, e.g., 123 Cong Rec 22166-22167 (1977) (Rep. Cohen, discussing Catawba claim and others); id., at 22168 (Rep. Walsh); id., at 22170 (Rep. Hanley); 126 Cong Rec 5748-5749 (1980) (Rep. Holland, discussing Catawba claim); id., at 5750 (Rep. Udall). Members of Congress emphasized repeatedly that Indian land claims were difficult to research, that Indians historically had lacked adequate legal assistance and administrative resources, and that the United States had not played its proper role in bringing suits on the Indians' behalf. See, e.g., 123 Cong Rec 22170 (1977) (Rep. Collins); id., at 22171 (Rep. Johnson); 126 Cong Rec 3289 (1980) (Sen. Cranston); id., at 5745-5746 (Rep. Clausen); id., at 5747 (Rep. Danielson); id., at 5750 (Rep. Swift). See also 123 Cong Rec 22171 (1977) (Rep. Weiss) ("[A]s a result of the numerous injustices suffered by American Indians during the last 150 years – many at the hands of the American Government – it is incumbent on the United States to give these people – our country's first inhabitants – a full chance to redress their grievances"); 126 Cong Rec 3287 (1980) (Sen. Melcher) (failure to extend statute of limitations could lead to "mass injustices"). Similar considerations presumably motivated Congress' decision to exempt entirely all claims for title or possession from the limitations period prescribed in § 2415.

provided by federal statute. Borrowing a state statute of limitations in such a case "would be a violation of Congress' will." 470 US, at 244, 84 L Ed 2d 169, 105 S Ct 1245.

In determining whether the 1959 Division of Assets Act exempts the Catawbas' claim from this general principle, analysis must begin with the firmly established rule – which the Court today implicitly reaffirms, see ante, at 506, 90 L Ed 2d, at 498-499 – that ambiguities in statutes regulating Indian affairs are to be construed in the Indians' favor. See, e.g., Oneida II, 470 US, at 247-248, 84 L Ed 2d 169, 105 S Ct 1245; Bryan v Itasca County, 426 US 373, 392, 48 L Ed 2d 710, 96 S Ct 2102 (1976); Northern Cheyenne Tribe v Hollowbreast, 425 US 649, 655, n 7, 48 L Ed 2d 274, 96 S Ct 1793 (1976); DeCoteau v District County Court, 420 US 425, 444, 43 L Ed 2d 300, 95 S Ct 1082 (1975); United States v Santa Fe Pacific R. Co. 314 US 339, 353-354, 86 L Ed 260, 62 S Ct 248 (1941); Alaska Pacific Fisheries v United States, 248 US 78, 89, 63 L Ed 138, 39 S Ct 40 (1918); Choate v Trapp, 224 US 665, 675, 56 L Ed 941, 32 S Ct 565 (1912); see generally F. Cohen, Handbook of Federal Indian Law 221-225 (1982). This rule is not simply a method of breaking ties; it reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people whom our Nation long ago reduced to a state of dependency. The rule is particularly appropriate when the statute in question was passed primarily for the benefit of the Indians, as was the 1959 Division of Assets Act. Absent "clear and plain" language to the contrary, Santa Fe Pacific, 314 US, at 353, 86 L Ed 260, 62 S Ct 248, it must be assumed that Congress did not intend to belie its "avowed solicitude" for the Indians, id., at 354, 86 L Ed

260, 62 S Ct 248, with a "backhanded" abrogation or limitation of their rights, Menominee Tribe v United States, 391 US 404, 412, 20 L Ed 2d 697, 88 S Ct 1705 (1968).

The Court today evidently finds in § 5 of the Division of Assets Act "the clearly expressed intent of Congress," ante, at 506, 90 L Ed 2d, at 498, that the Catawbas' tribal land claim was to be subject to South Carolina's statute of limitations. The Court relies largely on two provisions of § 5. The first renders inapplicable to the Catawbas all "special services performed by the United States for Indians because of their status as Indians," and "all statutes of the United States that affect Indians because of their status as Indians." The second provides that state laws shall "apply to [the Catawbas] in the same manner they apply to other persons or citizens." 25 USC § 935 [25 USCS § 935]. Neither of these provisions, in my view, is able to bear the weight the Court places upon it.

A

The first provision merely renders federal Indian "services" and "statutes" inapplicable to the Catawbas. I agree with the Court that this provision makes the Nonintercourse Act, along with other Indian statutes, inapplicable both to individual Catawbas and to the Tribe. See ante, at 505-509, 90 L Ed 2d, at 498-500. But that simply means that after the Division of Assets Act went into effect, the Tribe no longer was statutorily barred from selling or leasing its land. The services-and-statutes clause of the Act does not expressly abrogate or place procedural conditions on any *pre-existing* claims the

Catawbas may have had, and the broad federal policy against application of state statutes of limitations to Indian land claims is neither a "service" nor a "statute."

The majority nonetheless asserts that this Court has "long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims." Ante, at 508, 90 L Ed 2d, at 499-500. The cases it cites for that proposition all were decided well before the emergence during the past 35 years of a clear congressional policy against the application of state statutes of limitations to Indian land claims. See Oneida II, 470 US, at 240-244, 84 L Ed 2d 169, 105 S Ct 1245. More importantly, all the cases cited by the majority involve lands for which patents had been issued to individual Indians, not lands alleged to remain tribal property. This Court made clear in Oneida I that claims arising under such patents are not federal claims at all, because, "[o]nce patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts." 414 US, at 676, 39 L Ed 2d 73, 94 S Ct 772. In this case, however, as in Oneida I, "the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the substantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." 414 US, at 677, 39 L Ed 2d 73, 94 S Ct 772. Here, as in Oneida I, the complaint thus "asserts a

present right to possession under federal law." Id., at 675, 39 L Ed 2d 73, 94 S Ct 772.

I do not see how a statute removing restraints on alienation can fairly be said to signal unambiguously a congressional intent to subject pre-existing tribal land claims arising under federal law to state statutes of limitations. But even if I agreed with the majority that the removal of restraints on alienation should trigger the application of state limitations periods, the 1959 Act lifted only *statutory* restrictions on the alienation of Catawba land, and the requirement that the Federal Government approve any transfer of the property at issue in this case did not, and does not, stem solely from any federal statute. The land set aside for the Catawbas in 1760 and 1763 was within the Tribe's aboriginal territory,[7] and their claim to the land thus derives from original title[8] as well as from the 18th-century treaties.[9] With respect to original

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[7] John Stuart, the King's Superintendent of Indian Affairs, who had negotiated the Treaty of Augusta, noted in a 1772 letter to the South Carolina Governor that the 144,000 acres reserved for the Catawbas in that treaty were, "as well as a very considerable Extent of Country besides[,] possessed by them when the Subjects of England first Settled in this part of the World." 6 Record, Ex 7, p 1.

[8] See generally F. Cohen, Handbook of Federal Indian Law 486-493 (1982); Cohen, Original Indian Title, 32 Minn L Rev 28 (1947); Note, Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial, 75 Colum L Rev 655 (1975).

[9] This Court long has respected grants of land to Indian tribes by prior governments. See, e.g., United States v Title Insurance & Trust Co. 265 US 472, 484, 68 L Ed 1110, 44 S Ct 621 (1924), quoting Barker v Harvey, 181 US 481, 491-492, 45 L Ed

title, at least, the Nonintercourse Act merely " 'put in statutory form what was or came to be the accepted rule – that the extinguishment of Indian title required the consent of the United States.' " Oneida II, 470 US, at 240, 84 L Ed 2d 169, 105 S Ct 1245, quoting Oneida I, 414 US, at 678, 39 L Ed 2d 73, 94 S Ct 772.[10]

There is nothing in the 1959 legislation that indicates that Congress intended to exempt the Catawbas from this common-law protection of undistributed tribal property as well as from its statutory codification. Nor is there

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963, 21 S Ct 690 (1901) (" 'There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its powers of disposal' "); Mitchel v United States, 9 Pet 711, 9 L Ed 283 (1835).

[10] The federal common-law rule against alienation of aboriginal title without the consent of the sovereign was recognized as early as 1823 in Chief Justice Marshall's opinion for the Court in Johnson v McIntosh, 8 Wheat 543, 573-574, 5 L Ed 681 (1823), and it is reflected in the Constitution's Indian Commerce Clause, Art I, § 8, cl 3, which made "Indian relations . . . the exclusive province of federal law," Oneida II, 470 US, at 234, and n 4, 84 L Ed 2d 169, 105 S Ct 1245. See Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 U Main L Rev 17, 28-29 (1979). In Oneida II, the Court rejected a suggestion that Indian common-law rights to tribal lands were somehow swallowed up or pre-empted by the Nonintercourse Act; it made clear that the common law still furnishes an independent basis for legal relief. See 470 US, at 236-240, 84 L Ed 2d 169, 105 S Ct 1245.

anything to indicate that Congress meant to abrogate the protection promised to the Tribe under the treaties of 1760 and 1763, which the Tribe claims provide an independent source of continuing federal protection. Indeed, in rejecting an argument that a similar provision of the Menominee Termination Act destroyed treaty rights to hunt and fish, this Court noted: "The use of the word 'statutes' is potent evidence that no *treaty* was in mind." Menominee Tribe, 391 US, at 412, 20 L Ed 2d 697, 88 S Ct 1705 (emphasis in original). In the same way, Congress' use in 1959 of the terms "services" and "statutes" suggests, if anything, that the Division of Assets Act was not intended to remove other sources of protection. Surely the selection of these terms provides no support for the view that Congress meant to impose new procedural requirements on pre-existing tribal land claims based not only on statutory provisions, but also on treaty rights and federal common law.[11]

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[11] The Tribe's complaint requests relief under the treaties of 1760 and 1763, the Nonintercourse Act, the Indian Commerce Clause, Art I, § 8, cl 3, and the constitutional prohibition against state treaties, Art I, § 10, cl 1. App 23. Reading the complaint liberally "so . . . as to do substantial justice," Fed Rule Civ Proc 8(f), I would conclude that the constitutional references suffice to invoke the rule that original Indian title may not be alienated without federal approval. Cf. Brief for United States as Amicus Curiae in Connecticut v Mohegan Tribe, O T 1980, No. 80-1365 [452 US 968, 69 L Ed 2d 981, 101 S Ct 3124], p 7 (describing the rule as "constitutionally based"). A narrower construction of the complaint would be especially inappropriate because the Tribe adopted the United States' brief in Mohegan Tribe as part of its response in the District Court to the defendants' motion to dismiss, making clear that the constitutional claims raised in the complaint were to be read to embrace the common-law rule. See

B

The second provision of the 1959 Act relied on by the Court directs that "the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." I agree with the Court that the word "them" must be understood to refer not only to individual Catawbas, but also to the Tribe. See ante, at 506-507, 90 L Ed 2d, at 498-499. Clearly, however, "them" does not refer to *claims* brought by the Catawbas; the term encompasses the plaintiff in this case, but not the cause of action.

This distinction is critical. The "laws of the several States" provision of the Division of Assets Act placed the Catawbas on the same footing as non-Indians with regard to the application of state law. Just as a non-Indian's action based on South Carolina law must be brought within the time specified by the State, so a state-law action brought by a Catawba – or by the Catawba Tribe – must meet the same requirement. If a non-Indian in South Carolina brings a *federal* claim, however, the limitations period is determined by federal law. The same must hold

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Plaintiff's Memorandum in Support of Motion for Leave to File Supplemental Memorandum and Supplemental Memorandum, 1 Record, Ex 15.

Because, under my view, the Tribe's treaty claims add nothing material for present purposes to its common-law claim, I would not decide at this time whether the 1760 and 1763 treaties independently required the United States, as successor to Great Britain, to approve any sale or lease of the 144,000 acres. Why the majority finds no need to discuss this question, or the issue of common-law restraints on alienation, is harder to understand.

for the federal claims raised by the Catawbas in this litigation.

Of course, the real question in this case is not whether federal law governs the limitations question, but whether federal law should borrow South Carolina's period of limitations, notwithstanding the general federal policy against such borrowing in the context of Indian land claims. My point here is that this question is not answered by the statutory instruction to apply state law to the Catawbas "in the same manner" as it is applied to non-Indians. Subjecting a group of Indians to state law to the same extent as other citizens is far different from subjecting their unique federal claims to a state statute of limitations. For non-Indians as well as Indians, the decision whether to apply a state limitations period to a federal claim depends on whether such application is deemed contrary to federal policy. And nothing in § 5 of the Division of Assets Act unambiguously directs that, as a matter of federal policy, the Catawbas' unsettled tribal claims should be treated any differently for statute-of-limitations purposes from other tribal land claims. Indeed, there is no indication that Congress thought about such claims at all.[12]

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[12] The Senate and House Reports both explained that the purpose of the 1959 legislation was "to distribute the bulk of the [Catawbas'] tribal assets" among the members of the Tribe. S Rep No. 863, 86th Cong, 1st Sess, 1 (1959); HR Rep No. 910, 86th Cong, 1st Sess, 2 (1959). Each Report contained a list of the Tribe's assets; the list made no mention of the Catawbas' claim to their 18-century treaty lands. See S Rep No. 863, at 3; HR Rep No. 910, at 4.

C

The Court does not rely exclusively on the terms of the two provisions discussed above; it also emphasizes that the Division of Assets Act as a whole represented an "explicit redefinition of the relationship between the Federal Government and the Catawbas," terminating "special federal protection" for the Tribe and its members. Ante, at 508, 90 L Ed 2d, at 499; see also ante, at 510, 90 L Ed 2d, at 501.[13] But if we take seriously the "eminently sound and vital canon" that all ambiguities in statutes passed for the benefit of Indians are to be construed in the Indians' favor, Northern Cheyenne Tribe, 425 US, at 655, n 7, 48 L Ed 2d 274, 96 S Ct 1793, then surely the effect of such an "explicit redefinition" must be limited to its explicit terms. The Court recognized as much in Menominee Tribe, supra, when it refused to read into the Menominee Termination Act an abrogation of the Menominees' treaty rights to hunt and fish. Regardless of the general thinking behind the termination policy of the 1950's, we are faced here with a particular statute, and we should not " 'strain to implement [an assimilationist] policy Congress has now rejected.' " Bryan v Itasca County, 426 US, at 389, n 14, 48 L Ed 2d 710, 96 S Ct 2102, quoting

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[13] The majority rightly places little weight on the fact that § 5 of the 1959 Act revoked the Tribe's Constitution. The Catawbas had no tribal constitution until 1944, when they adopted one pursuant to the 1943 Memorandum of Understanding. See, e.g., HR Rep No. 910, 86th Cong., 1st Sess, 5 (1959). Revocation of the Constitution therefore can hardly be understood as a statement that the Tribe should cease existence or lose any pre-existing claims.

Santa Rosa Band of Indians v Kings County, 532 F2d 655, 663 (CA9 1975).

Such straining is particularly inappropriate in this case, where the statute in question was passed at the Indians' behest, was apparently intended to carry out the Indians' wishes, and received the Indians' support based on federal assurances that it would not "affect the status" of their claim against the State. One, of course, can distinguish formally, as the majority does, see ante, at 510, 90 L Ed 2d, at 501, between preserving the "status" of the claim and preserving the claim's immunity from the state statute of limitations. But the distinction smacks of the kind of semantic trap that this Court consistently has attempted to avoid when construing governmental agreements with Indians and statutes ostensibly passed for the benefit of Indians. In cases involving Indian treaties, for example, it has long been the rule not only that doubtful expressions must be construed in the Indians' favor, but also that the entire treaty must be interpreted as the Indians would have understood it. See, e.g., Choctaw Nation v Oklahoma, 397 US 620, 631, 25 L Ed 2d 615, 90 S Ct 1328 (1970); Jones v Meehan, 175 US 1, 11, 44 L Ed 49, 20 S Ct 1 (1899); Worcester v Georgia, 6 Pet 515, 582, 8 L Ed 483 (1832).

The Catawbas were assured in unqualified terms that the 1959 legislation would not jeopardize their century-old grievance against the State of South Carolina. The Act itself said nothing about the claim, and nothing about statutes of limitations. No one told the Indians or the voting Members of Congress that the statute might some day prevent the Tribe from pursuing its claim in court. The Court nevertheless concludes today that the 1959 Act

bars the Catawbas' claim if the limitations period under South Carolina law expired between the passage of the Act and the initiation of this lawsuit in 1980, and that this interpretation of the statute comports with the promises made to the Catawbas in the 1950's. I cannot agree with either conclusion. In my view, this decision breaks faith once again with the Tribe, and it does so in a way the statute does not require. Nothing in the text or legislative history of the Act evinces a congressional desire to mislead the Indians, or an understanding that the Act sometime might be construed as it is by the Court today.

III

Apparently, there no longer are any full-blood Catawbas, and no one now speaks the Catawba language. See Charlotte Observer, Mar. 6, 1977, p 1C, reprinted in Hearing at 420. Of the 1,200 or so persons currently on the tribal roll, only about 5 or 10 percent live on the 630-acre reservation still held for the Tribe by the State of South Carolina.[14] The reservation itself does not differ conspicuously from other rural neighborhoods in South Carolina. Indeed, "[a]n unobservant tourist may well drive through the reservation unawares, and many do." C. Hudson, The Catawba Nation 3 (1970). For the most part, modern-day Catawbas "think and live like ordinary Americans of the Southeast." Ibid.

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[14] See, e.g., Hearing, at 20 (statement of Leo M. Krulitz, Interior Department Solicitor); id., at 39 (statement of Claude Ayres, Member, Catawba Indian Nation Land Claim Committee); Proposed Catawba Indian Reservation Land Use Analysis 4 (1977), reprinted in Hearing, at 251, 258.

When an Indian Tribe has been assimilated and dispersed to this extent – and when, as the majority points out, thousands of people now claim interests in the Tribe's ancestral homeland, see ante, at 499-500, 90 L Ed 2d, at 494-495, and n 4 – the Tribe's claim to that land may seem ethereal, and the manner of the Tribe's dispossession may seem of no more than historical interest. But the demands of justice do not cease simply because a wronged people grow less distinctive, or because the rights of innocent third parties must be taken into account in fashioning a remedy. Today's decision seriously handicaps the Catawbas' effort to obtain even partial redress for the illegal expropriation of lands twice pledged to them, and it does so by attributing to Congress, in effect, an unarticulated intent to trick the Indians a century after the property changed hands. From any perspective, there is little to be proud of here.

Because I do not believe that Congress in 1959 expressed an unambiguous desire to encumber the Catawbas' claim to their 18th-century treaty lands, and because I agree with Justice Black that "[g]reat nations, like great men, should keep their word," FPC v Tuscarora Indian Nation, 362 US 99, 142, 4 L Ed 2d 584, 80 S Ct 543 (1960) (dissenting opinion), I do not join the judgment of the Court.

APPENDIX E

PUBLIC LAW 102-339 – AUG. 11, 1992

106 STAT. 869

Public Law 102-339
102d Congress

An Act

To provide additional time to negotiate settlement of a land dispute in South Carolina.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FINDINGS.

The Congress finds the following:

(1) Suits on possessory land claims may be commenced against tens of thousands of citizens in York, Lancaster, and Chester Counties, South Carolina, within the area claimed in the suit Catawba Indian Tribe of South Carolina against State of South Carolina, et al., Civil Action No. 80-2050 (D.S.C.)

(2) Tens of thousands of such suits would be costly to all parties, including the Federal judicial system, and would create a burden upon interstate commerce.

(3) The filing of such suits may be averted by settlement if additional time is made available for the parties to negotiate and implement the terms of settlement.

(4) The Congress has authority to enact this legislation under the Indian Commerce Clause and the Interstate Commerce Clause of the Constitution; and the Department of Justice

concurs in this construction of Article I of the Constitution.

SEC. 2. PURPOSE.

The purpose of this Act is to prevent the social, economic, and judicial disruption that would result from the commencement of law suits against tens of thousands of citizens in York, Lancaster, and Chester Counties, South Carolina, and the burden on interstate commerce that such suits would impose. The parties to the above referenced suit require additional time in which to negotiate and implement the terms of settlement; and if such time is made available, it may avert the necessity of thousands of law suits. The purpose of this Act is not to revive, renew, or extend any claim barred by any period of limitation, repose, or time bar as of the effective date of this Act.

SEC. 3. STATUTE OF LIMITATION.

(a) If any period of limitation or repose, or any other defense based wholly or partly on the passage of time, bars any claim brought by or on behalf of any Indian, Indian nation, or tribe or band of Indians claiming or asserting damages or an interest in land in York, Lancaster, or Chester Counties, South Carolina, under section 2116 of the Revised Statutes (25 U.S.C. 177; commonly known as the Indian Non-Intercourse Act), the Constitution of the United States, common law, or any treaty, as of the date of enactment of this Act, such period of limitation or repose, or other defense based wholly or partly on passage of time, shall bar any such claim,

without regard to whether such claim has already been filed.

(b) If any period of limitation or repose, or any other defense based wholly or partly on the passage of time, has not barred any claim, filed or unfiled, by or on behalf of an Indian, Indian nation, or tribe or band of Indians claiming or asserting damages or an interest in land in York, Lancaster, or Chester County, South Carolina, under section 2116 of the Revised Statutes (25 U.S.C. 177; commonly known as the Indian Non-Intercourse Act), the Constitution of the United States, common law, or treaty, as of the date of the enactment of this Act, the running of any such period of limitation or repose, or any other defense based wholly or partly on the passage of time, shall be suspended as of the date of the enactment of this Act until October 1, 1993. On October 1, 1993, the time upon which any such defenses are based shall resume running. The period of time remaining for any time-related defense to become a bar to any such claim shall be the same on October 1, 1993, as it was immediately prior to the date of the enactment of this Act. Nothing in this subsection shall be construed to affect the application of any period of limitation, repose, or time bar to the claim of any individual Indian which is pursued under any Federal or State law generally applicable to non-Indians as well as Indians.

Approved August 11, 1992.

Supreme Court, U.S.
FILED
FEB 11 1993
OFFICE OF THE CLERK

No. 92-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC.,
Petitioner,

v.

STATE OF SOUTH CAROLINA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Dated: February 11, 1993

QUESTION PRESENTED

Did the Court of Appeals properly review the affidavits and other materials supporting the district court's grant of summary judgment to those defendants who attested that they met the South Carolina standard for adverse possession because they held and possessed their property under claim of title, paid taxes and took steps to protect the property from trespassers, and the plaintiff did not present any evidence suggesting that there was a genuine issue of material fact as to whether the defendants had possessed the property?

PARTIES IN THE COURT OF APPEALS

Fifty-two defendants were granted summary judgment by the district court.* Although the district court's order resolved less than all the claims, the district court made its order appealable pursuant to Fed. R. Civ. P. 54(b). The plaintiff is "The Catawba Indian Tribe, Inc.," a non-profit organization incorporated in 1975 under South Carolina law and operated by persons alleged to be descendants of Catawba Indians.

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* The defendants who received summary judgment for some or all of their property are: the State of South Carolina; City of Rock Hill; Bowater Carolina Corporation; Celanese Corporation of America; Citizens and Southern National Bank of South Carolina; Crescent Land & Timber Corp.; Duke Power Company; Herald Publishing Company; Southern Railway Company; Springs Mills, Inc.; Wachovia Bank and Trust Company; Ashe Brick Company; Church Heritage Village & Missionary Fellowship; C.H. Albright, Ned Albright; John Wesley Anderson, David Goode Anderson; Elizabeth Ardrey Grimball, John W. Ardrey, Ardrey Farms; F.S. Barnes, Jr.; Archie B. Carroll, Jr.; Lillian Crandall Close, Francis Ellison Close, Leroy Springs Close, Patricia Close, William Elliot Close, Hugh William Close, Jr.; Robert A. Fewell; Annie F. Harris; T.W. Hutchinson, Hiram Hutchinson, Jr.; F.M. Mack, Jr.; Arnold F. Marshall; Will R. Simpson, John S. Simpson, Robert T. Simpson; Thomas Brown Snodgrass, Jr.; John M. Spratt; Marshall E. Walker; Hugh M. White, Jr.; John M. Belk; Jane Nisbet Goode, R.N. Bencher, W.O. Nisbet III; J. Max Hinson; W.A. McCorkle, Mary McCorkle; William O. Nisbet; Eugenia Nisbet White, Mary Nisbet Purvis, E.N. Martin.

A Rule 29.1 listing of the parent companies and subsidiaries of defendant corporations in the district court is attached as an appendix.

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IN THE

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CATAWBA INDIAN TRIBE OF SOUTH CAROLINA, INC.,
Petitioner,

v.

STATE OF SOUTH CAROLINA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

I. THE PROCEEDINGS BELOW AND THE ISSUES FOR REVIEW.

Petitioner is a non-profit organization incorporated in 1975 under South Carolina law. This organization contends that a voluntary sale by the Catawbas of the lands in issue pursuant to an 1840 treaty with the State of South Carolina was invalid and that it retains the right to void the 1840 transaction. According to the Catawbas, a federal statute known as the Nonintercourse Act [1] re-

[1] The Nonintercourse Act, first enacted in 1790 and most recently modified in 1834, is presently codified at 25 U.S.C. § 177 (1976). The term refers to restrictions on the alienation of Indian lands contained in a series of more comprehensive acts regulating Indian affairs, each known as the "Indian Trade and Intercourse Act."

Jurisdiction in the district court was asserted pursuant to 28 U.S.C. §§ 1331, 1337 and 1361.

quired federal approval or consent to this voluntary sale, and such federal approval or consent was lacking.

In *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 511 (1986); Pet. App. 172a, 187a, this Court held that the Catawba termination act, 25 U.S.C. §§ 931-938, "requires the application of the state statute of limitations to the [Catawbas'] claim." However, "[b]ecause the Court of Appeals is in a better position to evaluate such an issue of state law," the case was remanded to the Court of Appeals for a review of the district court's holding that the statute of limitations completely barred the claim. *Id.*

Upon remand, the district court's original grant of summary judgment was partially affirmed by the Court of Appeals and remanded for further proceedings. *Catawba Indian Tribe of South Carolina v. State of South Carolina*, 865 F.2d 1444 (4th Cir. 1989) (en banc), *cert. denied*, 491 U.S. 906 (1989), Pet. App. 132a. In doing so, the Court of Appeals held that the district court properly entered summary judgment dismissing the plaintiff's claims against any named defendant

> who holds and possesses property that has been held and possessed adversely to the tribe's legal title for ten years after the revocation of the tribe's constitution, July 1, 1962, and before the commencement of this action, October 20, 1980, without tacking except by inheritance.

Id. at 1446, Pet. App. 133a.[2]

Following remand to the district court, a number of the respondents filed a supplemental brief in support of their original summary judgment motion, together with supporting affidavits, demonstrating that they had "held

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[2] In its recent opinion, the Court of Appeals noted that "[t]he complaint actually was filed on October 28, 1980. Therefore, the defendants had until October 28, rather than October 20, to fulfill the ten year requirement." Opinion, Pet. App. 7a n.4.

and possessed adversely" for the requisite ten-year period without tacking. After an exchange of briefs, further affidavits presented by both sides and two lengthy hearings, the district court entered summary judgment in a series of four Judgment Orders, dismissing the plaintiff's claim as to certain parcels of land. *Catawba Indian Tribe of South Carolina v. State of South Carolina*, No. 80-2050 (D.S.C. July 18, 1990) (unreported); Pet. App. 104a-131a. To the extent that it appeared that those parcels included all of the land in the claim area of a named respondent, the named respondent was dismissed as well.

The Catawbas appealed all four of the Judgment Orders to the Court of Appeals which, after detailed examination of all the affidavits, affirmed in part and reversed in part. *Catawba Indian Tribe v. South Carolina*, No. 90-2446 (4th Cir. September 22, 1992) (en banc) ("Opinion"), Pet. App. 1a-103a. Following a review of South Carolina adverse possession precedent, the Court of Appeals concluded that each moving landholder must demonstrate "actual, open, notorious, hostile, continuous and exclusive possession." Opinion (citing *Crotwell v. Whitney*, 229 S.C. 213, 92 S.E.2d 473, 477 (1956)), Pet. App. 9a-10a. Applying that standard to the circumstances of this case, the court held that a respondent who produces evidence, by affidavits or otherwise, that "he or a predecessor held the record title to the property, possessed, occupied, or held the property, paid taxes on the property, and took steps to protect the property from trespassers" for the requisite period would meet the requirements of adverse possession under South Carolina law and the burden under Rule 56 of the Federal Rules of Civil Procedure. Opinion, Pet. App. 11a.

The Court of Appeals found, as to the parcels which it affirmed, that the affidavits submitted by the moving respondents were sufficient in this respect. The Court of Appeals determined that, in order to avoid summary judgment, the Catawbas were required to set forth by affidavit or otherwise specific facts showing that there is

a genuine issue for trial, a burden they had not met. Absent a showing that "there is a dispute as to whether a [respondent] claimant did those things claimed in the affidavit," the Court of Appeals found there was no "material issue of fact" and summary judgment was properly granted.[3] Opinion, Pet. App. 14a. Applying these principles, the court reviewed the record facts for each of the properties placed in issue by each of the moving respondents. Opinion Appendix A, Pet. App. 37a-103a.

II. STATEMENT OF FACTS.

The only facts relevant to this appeal concern the possession of the parcels in issue during the period from July 1, 1962 to October 28, 1980. Those facts, which are unique for each parcel, are set forth in the voluminous affidavits and title documents filed in the district court and reproduced in the record before the Court of Appeals.

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision does not warrant review. The unanimous en banc decision below affirming the district court reflects the considered and careful judgment of the Court of Appeals regarding the application of the adverse possession law of South Carolina.

As a result of this Court's earlier decision, *Catawba*, 476 U.S. 498, and the Court of Appeals' subsequent en banc decision, *Catawba*, 865 F.2d 1444, the only issue before the Court of Appeals was the state law question of whether the landholders adversely possessed various par-

[3] The Court of Appeals ruled as well on a number of other issues raised by petitioner in its appeal from the Judgment Orders, remanding some of the parcels for further hearings. Opinion, Pet. App. 15a-35a. However, the petition for certiorari does not address them and does not present them as questions for review.

cels between 1962 and 1980.[4] The moving respondents filed hundreds of pages of affidavits and related documents demonstrating that they held record title to and possessed the parcels on which they moved for at least ten years without tacking between 1962 and 1980. Except for one parcel, the Catawbas presented no facts—much less facts which even hint that there could be any genuine issue of material fact—concerning these properties. Instead they attacked the form of almost every affidavit, contending, for example, that affidavits describing a hundred year old college or farms worked for generations did not sufficiently establish adverse possession. According to the Catawbas, a landholder's expression of the fact that he possessed or used the property was deficient because it was expressed in a way the Catawbas strained to label as vague or conclusory.

This effort to substitute argument for evidence was properly rejected by the Court of Appeals which held that once a landholder had established sufficient facts to sustain a motion for summary judgment in his favor, the burden shifted to the petitioner to establish that there was a "material issue of fact." The petition's real challenge is not to the legal standard applied by the Court of Appeals, but rather to the factual basis for the district court's and the Court of Appeals' conclusions. The numerous affidavits and related documentation of record title which were individually reviewed by the Court of Appeals amply support the court's conclusions. A con-

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[4] The Catawbas, seeking to obtain land they admittedly have not "actually occupied and enjoyed" for well over a century, pled that the defendants "are keeping" them "out of possession" and, indeed, that the defendants and their predecessors have committed "trespass . . . for the entire period of dispossession." Complaint ¶¶ 19, 22, 1. It is, therefore, undisputed that the subject lands have been conveyed, used and possessed by persons other than the Catawbas for the past 150 years in the same manner as other real property anywhere else and that the Catawbas were well aware that others possessed and claimed the property.

troversy such as this, involving state law and based purely on differing assessments of the facts, is not appropriate for review by this Court.

I. THE COURT OF APPEALS CORRECTLY APPLIED THE SOUTH CAROLINA LAW OF ADVERSE POSSESSION.

A. The Court of Appeals' Formulation of the Legal Standards for Adverse Possession Accurately Reflects South Carolina Law.

South Carolina long ago established that adverse possession "is the actual occupation . . . of land as one's own." *Sumner v. Murphy*, 9 S.C.R. (2 Hill) 488, 495 (1834) (quoting *Simmons v. Parsons*, 9 S.C.R. (2 Hill) 492 (1829)); *accord*, *Sudduth v. Sumeral*, 61 S.C. 276, 39 S.E. 534, 539 (1901) (quoting *Gray v. Bates*, 14 S.C.R. (3 Strob.) 498, 502 (1849)). The Court of Appeals held that a landholder meets this requirement if he produces affidavits or other sufficient documents establishing that "he or a predecessor held the record title to the property, possessed, occupied, or held the property, paid taxes on the property, and took steps to protect the property from trespassers" for the requisite period of time. Opinion, Pet. App. 11a. This holding correctly stated the South Carolina law of adverse possession.

In South Carolina, one who possesses land other than the legal title holder is presumed to be possessing that land adversely. In *Mullis v. Winchester*, 237 S.C. 487, 118 S.E.2d 61, 66 (1961), the South Carolina Supreme Court stated that "[a]s a general rule, the law presumes that the exclusive possession of land by one who is a stranger to the holder of the legal title is adverse." Applying the rule of *Mullis*, the Court of Appeals determined that, if the Catawbas were assumed to hold legal title to the property they seek, any person other than the Catawbas who possessed the property would be a stranger

to the holder of legal title and presumed to be holding adversely. Opinion, Pet. App. 12a.

Moreover, when "a person goes into possession of land under a deed from a third person which purports on its face to convey to him an absolute and exclusive title to the entire interest in the land, and such deed is spread upon the public records, this is notice to the world that he is claiming the entire and exclusive interest in the land, and his possession may be adverse to all the world from the time of its commencement." *Sudduth v. Sumeral*, 61 S.C. 276, 39 S.E. 534, 539 (1901); *see also Epperson v. Stansill*, 64 S.C. 485, 42 S.E. 426, 427 (1902) ("possession is adverse when it is under claim of right"). Applying this authority, the Court of Appeals appropriately concluded that the elements of adverse possession would be satisfied under South Carolina law when a landholder established continuous possession of a parcel of property under color of title.

The Court of Appeals' formulation of the legal standards for adverse possession, affirming those utilized by the district court below, accurately reflects the law of South Carolina. The petitioner's claims that the Court of Appeals fashioned "new standards" for this case, Petition at 8, simply ignores the South Carolina law carefully applied by the Court of Appeals.

B. The Court of Appeals Correctly Determined That The Affidavits Submitted By The Landholders Adequately Establish Possession Under South Carolina Law.

The petition asserts that the Court of Appeals found affidavits concluding, in essence, "I was in possession" sufficient to meet respondents' initial burden and to shift to the petitioner the burden of demonstrating evidence of a genuine issue of material fact. Petition at 8. That argument mischaracterizes both the standard applied by the Court of Appeals in reviewing each of the affidavits and the content of the affidavits themselves.

The standard applied by the Court of Appeals clearly required more than a mere statement of possession or occupancy by the affiant. The district court and the Court of Appeals required that the affiant establish that he had record title to the property, that he had paid taxes and that he had taken steps to protect the property from trespassers for the required period. Opinion, Pet. App. 11a. Nowhere in the petition do the Catawbas identify any affidavits involving property as to which the Court of Appeals affirmed which do not meet all of the elements of this standard.

Moreover, the Court of Appeals' review of the affidavits and of the law of South Carolina properly led it to conclude that "th[e] averments made in the affidavits are sufficient to satisfy the open, notorious, continuous, and hostile requirements." Opinion, Pet. App. 15a. In fact, the affidavits of the landholders set forth a variety of circumstances of possession comporting with the variety of different uses to which the land was put. Although the extent of the detail provided in the recitation of that possession varies from affidavit to affidavit—as might be expected given the number of different defendants and properties involved—the Court of Appeals concluded that the averments in the affidavits "are sufficient to establish possession for adverse possession purposes." Opinion, Pet. App. 14a, (citing *Mullis*, 118 S.E.2d at 65 ("acts of adverse possession 'are only required to be exercised in such way and in such manner as is consistent with the use to which the lands may be put and the situation of the property' ")).

The Catawbas' basic argument, nowhere explicitly stated but everywhere implied, is that the landholders may not "state" that they possessed the disputed property, maintained it, or protected it against trespassers, but must detail every act of possession for ten years. However, the elements of adverse possession, including possession itself, are either simple or ultimate issues of fact but in no case conclusions of law.

The Federal Rules of Evidence authorize and regard as evidence affidavits that "state" that a landholder has met the elements of adverse possession. Fed. R. Evid. 701 permits testimony by a lay witness "in the form of opinions or inferences." Fed. R. Evid. 704(a) provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rules 701 and 704 authorize lay opinions and inferences on a wide range of ultimate issues. *See Hansard v. Pepsi-Cola Metro. Bottling Co. Inc.*, 865 F.2d 1461, 1466-67 (5th Cir.) (no abuse of discretion in admitting lay opinion that the plaintiff was terminated as part of the company's "youth movement" despite the fact that the witness had no first-hand knowledge of the specific termination), *cert. denied*, 493 U.S. 842 (1989); 7 Wigmore on Evidence § 1960 (Chadbourne rev. 1978) ("If a witness, in the course of his testimony, comes to mention that A 'possessed' or B 'owned' or C was 'agent,' let him not be made dumb under the law, and be compelled by evasions and circumlocutions to attain the simple object of expressing his natural thought. If there is a real dispute as to the net effect of the facts, these may be brought out in detail on cross-examination.").[5]

The Catawbas' argument that the landholders are obligated to set forth "specific actions . . . which they con-

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[5] Lay opinions and inferences are no less admissible because they are in affidavit form. *Samples v. City of Atlanta*, 846 F.2d 1328, 1334 (11th Cir. 1988); *Paton v. La Prade*, 524 F.2d 862, 871 (3d Cir. 1975) ("Opinion testimony that would be admissible at the actual trial may be submitted in an affidavit"). In the instant case, the affiants, usually record titleholders of the property at issue, clearly had personal knowledge to speak to issues of possession, payment of taxes, and the other elements of adverse possession, and the Court of Appeals so found as to the parcels as to which it affirmed. The Catawbas had the opportunity to probe any opinions and inferences by discovery and chose not to do so. *Cf. Oksanen v. Page Mem. Hosp.*, 945 F.2d 696, 708 (4th Cir. 1991).

tended constituted an entry and a continuous possession," Petition at 11, also disregards the purpose behind the requirements of adverse possession and overlooks the Catawbas' own admissions that they had actual knowledge the respondents were occupying, controlling and claiming the disputed parcels as their own. The reason for "prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that the record title or ownership is in danger." 3 Am. Jur. 2d *Adverse Possession* § 71 (1986). *Accord Mullis*, 118 S.E.2d at 66; *see also Gregg v. Moore*, 226 S.C. 366, 85 S.E.2d 279, 281 (1954) (holding that where entry onto land was not hostile, adverse possession could not begin until notice was "brought home to the true owner"). Conversely, in *Graniteville Co. v. Williams*, 209 S.C. 112, 39 S.E.2d 202 (1946), the South Carolina Supreme Court held that actual knowledge was unnecessary if the adverse claimant's possession "was so open, visible, and notorious" that the true owner "in the exercise of ordinary diligence should have had knowledge" of the claim. 39 S.E.2d at 206. "[O]pen, hostile and notorious possession is required where the true owner is *without actual knowledge* of the hostile claim. This is the law of South Carolina and the general law of the land." *Johnson v. Pritchard*, 302 S.C. 437, 395 S.E.2d 191, 197 (Ct. App. 1990) (emphasis added).

The Catawbas' insistence that the landholders have not provided sufficient detail to establish an adverse entry and occupation is fundamentally inconsistent with specific allegations in the complaint showing the Catawbas have always been aware that the land was possessed by others. By alleging that the defendants "are keeping" the Catawbas "out of possession" and have committed "trespass . . . for the entire period of dispossession" (and, indeed, by seeking trespass damages for that 140-year period), the Catawbas have conceded their actual knowledge of

the occupation of and claim to the land by the respondents and their predecessors. (Complaint, ¶¶ 22, 1).[6]

Under these circumstances, the Court of Appeals' application of South Carolina adverse possession law to the affidavits submitted by the landholders was correct. Moreover, the Catawbas failed to respond to those affidavits with evidence showing that any genuine issues of material fact remain to be resolved.

II. THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARDS UNDER RULE 56 TO HOLD THAT THE CATAWBAS DID NOT MEET THEIR BURDEN IN OPPOSING SUMMARY JUDGMENT.

A. The Ruling Below Is Consistent With The Parties' Respective Burdens On A Motion For Summary Judgment.

The petition should be denied because the affirmance of summary judgment by the Court of Appeals was entirely consistent with the burdens imposed by Fed. R. Civ. P. 56, and the relevant decisions of this Court. The Court of Appeals explicitly recognized that *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co., Inc. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), governed the analysis of the motion. Pet. App. at 8a-9a. Rule 56 places on the moving party the initial burden to show the absence of any genuine issue of material fact. However, once that burden is met—as both courts below concluded it was here—the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475

[6] This admission by the Catawbas relieved respondents of any obligation to prove those elements going to the legal owner's knowledge that his land was being claimed by others. The party moving for summary judgment has the burden of proof on every element of his claim "except those elements *admitted by his adversary in his pleadings*, or by stipulation, or otherwise during the course of pretrial." *United States v. Dibble*, 429 F.2d 598, 601 (9th Cir. 1970) (emphasis added).

U.S. at 586. The opposing party has an affirmative burden to produce "*specific facts* showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). As the Court of Appeals has put it, "[g]enuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice. A trial, after all, is not an entitlement. It exists to resolve what reasonable minds would recognize as real factual disputes." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Summary judgment procedure thus exists in order to resolve without trial those cases whose facts do not merit a trial. In the face of the landholders' affidavits clearly demonstrating their possession of the land, it was incumbent upon the Catawbas to produce any evidence they had which would demonstrate that there was some reason for the parties and the court to go through a trial. *See Blue Ribbon Feed Co. v. Farmers Union Cent. Exch. Inc.*, 731 F.2d 415, 419 (7th Cir. 1984) ("The purpose of summary judgment is to force the parties to show the court that trial would serve a meaningful purpose. . . . It accordingly was incumbent on [the party opposing summary judgment] to place before the court some evidentiary matter and convince the court that factual issues were genuinely in dispute").

Here, with the exception of two affidavits relating to one parcel of land,[7] the Catawbas did not even attempt to controvert the defendants' factual showing. In light of the petitioner's utter failure to produce any evidence controverting respondents' facts—let alone evidence upon which a reasonable jury could find in its favor—summary judgment was not merely proper, but required. Where there is no evidentiary basis to create a factual dispute, counsel's argument alone is not enough to defeat

[7] Those two affidavits were determined by the Court of Appeals to be insufficient to establish that the landholder's possession was other than exclusive and continuous. Opinion, Pet. App. 29a-31a.

summary judgment. *Securities and Exch. Comm'n v. Bonastia*, 614 F.2d 908, 914 (3d Cir. 1980); *see also Larry Harmon Pictures Corp. v. Williams Restaurant Corp.*, 929 F.2d 662, 663 n.1 (Fed. Cir.) (Counsel's argument that affidavit was biased, self-serving and suspect "insufficient to raise a genuine issue of material fact where there is an absence of probative evidence conflicting with" the affidavit), *cert. denied*, 112 S. Ct. 85 (1991); *Bloodgood v. Garraghty*, 783 F.2d 470, 475 (4th Cir. 1986) ("[B]are allegations of error," without any conflicting evidence to counter the moving party's affidavits, will not preclude summary judgment).[8]

The Catawbas ask this Court to forgive the consequences of their failure by arguing that the Court of Appeals erred in holding that respondents proved adverse possession by clear and convincing evidence. According to the Catawbas, no burden of production shifted to them. Pet. at 16-17. This is wrong because, as set forth *supra*, the district court and Court of Appeals correctly determined that the landholders met South Carolina's requirements for showing adverse possession. Nowhere did the Court of Appeals, as the Catawbas assert, "reject" the clear and convincing standard for showing adverse possession.

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[8] Although the opposing party may elect not to submit any affidavits or other evidence contradicting the facts set forth by the movant, he does so at his peril. *E.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161 (1970) (*quoting* 6 J. Moore, Federal Practice ¶ 56.22[2], pp. 2824-25 (2d ed. 1966)). In such a case the movant's uncontroverted facts are deemed admitted. *Kaszuk v. Bakery and Confectionary Union and Indus. Int'l Pension Fund*, 791 F.2d 548, 558 (7th Cir. 1986); *Jones v. Halekulani Hotel, Inc.*, 557 F.2d 1308, 1310 (9th Cir. 1977) (public easement by prescription established and summary judgment upheld because defendant's uncontradicted affidavits showing public use of the area "taken as true"); *see also United States v. Lot 9, Block 2 of Donnybrook Place, Harris County, Texas*, 919 F.2d 994, 998 (5th Cir. 1990) (opposing party's affidavit generally denying illegal activity but failing to controvert the specific facts alleged by the government could not defeat summary judgment for government).

The Catawbas failed to meet their burden of producing any evidence to show that there was a genuine issue of material fact remaining to be resolved. For this reason, summary judgment was properly granted and upheld by the courts below.

B. There Is No Conflict Between The Decision Of The Court of Appeals In This Case And Decisions Of Other Courts Of Appeals Concerning Affidavits Submitted On Summary Judgment.

The Catawbas attempt to manufacture a "conflict" between the Court of Appeals' holding below and decisions of other courts of appeals concerning the types of averments permissible in affidavits supporting a summary judgment motion. There is no conflict.

While certain of the cases cited by the Catawbas (Pet. at 15-16) stand for the general proposition that completely conclusory affidavits will not suffice to either support or oppose summary judgment, none conflicts with the Court of Appeals' decision here. Several of the decisions simply indicated disapproval of the particular affidavits at issue without setting forth the deficient statements, thus precluding any meaningful comparison to the landholders' affidavits.[9] Further, many of the cited cases involved attorney—not party—affidavits which were rejected because they were not based on personal knowledge.[10] Such cases are inapposite because, as the Court

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[9] *See Postscript Enter. v. City of Bridgeton*, 905 F.2d 223, 226 (8th Cir. 1990); *Toro Co. v. Krouse, Kern & Co., Inc.*, 827 F.2d 155, 162-63 & n.3 (7th Cir. 1987); *Union Ins. Soc. of Canton, Ltd. v. William Gluckin & Co. Inc.*, 353 F.2d 946, 952-53 (2d Cir. 1965).

[10] *Postscript Enter.*, 905 F.2d at 226; *Maldonado v. Ramirez*, 757 F.2d 48, 51 (3d Cir. 1985) (conclusion of continuing attorney-client relationship between plaintiff and another attorney was "conjecture" because based on examination of documents prepared by others); *Schiess-Froriep Corp. v. S.S. Finnsailor*, 574 F.2d 123, 126 (2d Cir. 1978) (attorneys' affidavits inadmissible because based solely on hearsay); *Union Ins.*, 353 F.2d at 952 (portions of attorneys' affidavits not based on personal knowledge were disregarded).

of Appeals found, the landholders' affidavits pertaining to the parcels as to which summary judgment was affirmed demonstrated that they were based on personal knowledge. Opinion, Pet. App. 15a-17a.[11]

Finally, the few cases cited by the Catawbas in which a party's rejected statements were actually described are distinguishable.[12] The rejected statements in those cases contained speculation concerning future events or ultimate conclusions of law. As such, they bear no resemblance to the affidavits herein, which recited the possession of affiants in a manner found by the courts below to be sufficiently detailed to establish adverse possession under South Carolina legal standards.

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[11] In a few instances, in fact, the Court of Appeals determined that insufficient personal knowledge was shown on the face of the affidavit and vacated and remanded. Opinion, Pet. App. 17a; Opinion Appendix A, Pet. App. 94a-97a.

[12] *May v. Department of Air Force*, 777 F.2d 1012 (5th Cir. 1985); *Aldahonda-Rivera v. Parke Davis & Co.*, 882 F.2d 590 (1st Cir. 1989); *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291 (5th Cir. 1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

STATEMENT PURSUANT TO RULE 29.1

The following lists the named defendant corporations by or on whose behalf this opposition to the petition for certiorari herein is filed, and each of their parent companies and subsidiaries (except wholly owned subsidiaries), if any:

Bowater Carolina Corporation and Catawba Timber Co. (now unincorporated divisions of Bowater Incorporated, whose non-wholly owned subsidiaries and affiliates are Catawba Newsprint Company, Bowater Mersey Paper Company Limited, and Pulpa y Papel Orinoco, S.A.)

Celanese Corporation of America (now known as Hoechst Celanese Corporation), a subsidiary whose ultimate parent is Hoechst Corporation, and whose non-wholly owned subsidiaries are:

Hoechst-Roussel Pharmaceuticals, Inc.
Hoechst-Roussel Agri-Vet Company
Hoechst Diafoil Company
Celgene Corporation
Interactive Radiation, Inc.
Codenoll Technology Corporation
Altus Corporation
Plumbing Claims Group, Inc.
Celanese Canada, Inc.
Edmonton Methanol Company
Canadian Methanol Venture
Quidnick Reservoir Company
Japan/U.S. Venture Partners
Steuben Partners, L.P.
Venad IV L.P.
NPC Services, Inc.
MBW Ventures Limited
BHC Company
IB Chemical Company
RV Chemicals Limited

Nantong Cellulose Fibers Company Ltd.
Verniplast, S.A.
Ticona Polymer-werke GmbH
Hessische Industrieinuell Gmbh
CTE Petrochemicals Company
National Methanol Company
Tortuga Casualty Co.
United Insurance Company
Delta Holding, Inc.
Hopewell Insurance Company Limited
Celanese Mexicana S.A.
Resinas de Mexico S.A. de C.V.
Bodegas Industriales S.A. de C.V.
Servicasas S.A.
CelMex Marketing Company, Inc.
Comercializadora de Textiles de Export acion S.A. de C.V.
Promociones Sociales Mexicanas, S.C.
Polyplastics Co., Ltd.
Taiwan Engineering Plastics Company, Ltd.
HCPP Mexicana S.A. de C.V.
CelMex Centro americana, S.A.
Inducel S.A. de C.V.
Novacel, S.A. de C.V.
Derivados Macroquimicas, S.A. de C.V.
Univex, S.A.
Inmobiliaria Sercel, S.A. de C.V.

Church Heritage Village and Missionary Fellowship, property presently owned by New Heritage Carolina Corporation, a wholly owned subsidiary of New Heritage USA Corporation.

Crescent Land & Timber Corp., now known as Crescent Resources, Inc., a subsidiary whose ultimate parent is Duke Power Company. Directly or through wholly owned subsidiaries, Crescent Resources, Inc. has a partial ownership interest in the following entities:

Tyvola Crossing Associates Limited Partnership
Coliseum Associates Limited Partnership
Matthews Village Partners
200 Meeting Street Limited Partnership
Sparkleberry Land Joint Venture Partnership
Festival Associates Limited Partnership
Fort Mill Hotel Associates Limited Partnership
II Tryon Investment Trading Society
Gateway Associates Partnership
Gateway Associates II Limited Partnership
Norman Associates Partnership
Norman Associates II Partnership
Anitoch Center Limited Partnership
Battlewood Center Limited Partnership
Cashua Center Limited Partnership

Duke Power Company. In addition to the entities listed above with respect to its subsidiary Crescent Resources, Inc., through wholly owned subsidiaries Duke Power Company has a partial ownership interest in the following entities:

Black River Limited Partnership
Mecklenburg Cogeneration Partners, L. P.
Duke/Fluor Daniel General Partnership
Duke/Jones Hanford Inc.
Fort Drum Cogeneration General Partnership
Central Termica Guemes S. A.
Powerco S. A.
Powerco Services S. A.

Southern Railway Company (now known as Norfolk Southern Railway Company), a wholly owned subsidiary of Norfolk Southern Corporation. The subsidiaries of Norfolk Southern Corporation with securities outstanding in the hands of the public are:

Central of Georgia Railway Company
High Point, Randleman, Asheboro and
Southern Railroad Company
Mobile and Birmingham Railroad Company

Norfolk and Western Railway Company
The North Carolina Midland Railroad Company
The South Western Rail Road Company
State University Railroad Company
Virginia and Southwestern Railway Company
Yadkin Railroad Company

Springs Mills, Inc. (now known as Springs Industries, Inc.)

Tega Cay Associates (now known as The Point Wylie Co.)

Wachovia Bank and Trust Company (now known as Wachovia Bank of North Carolina, N.A.), a subsidiary whose ultimate parent is Wachovia Corporation.

Ashe Brick Company (now an unincorporated division of Boral Brick Inc.)

Nisbet Farms, Inc.

Ardrey Farms

Supreme Court, U.S.
FILED
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No. 92-1088

In The

Supreme Court of the United States

October Term, 1992

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,

Petitioner,

v.

STATE OF SOUTH CAROLINA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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I. THE LAW OF THE CASE DISPOSES OF RESPONDENTS' ARGUMENT THAT THE TRIBE'S "KNOWLEDGE" OF RESPONDENTS' PURPORTED ADVERSE POSSESSION RELIEVES THEM OF THE BURDEN OF PROVING THE ELEMENTS OF ADVERSE POSSESSION.

Respondents inaccurately characterize the Tribe's complaint in this action as admitting actual notice of their adverse holding, thereby relieving respondents of the requirement of showing open, hostile, continuous and notorious possession. Opp. Br. at 10-11. This same argument was made by respondents and rejected by the Court of Appeals in *Catawba Indian Tribe of South Carolina v. State of South Carolina*, 865 F.2d 1444 (4th Cir. 1989) (*en banc*), *cert. denied*, 491 U.S. 906 (1989).

> The state, however, contends that inasmuch as the tribe acknowledges that it has not been in possession of the land since 1840, this judicial admission precludes it from relying on the presumption [of possession] . . . .
>
> Section 15-67-210 does not require a plaintiff to show both legal title and possession . . . . True, the presumption of possession is not conclusive. It can be rebutted, and the statute expressly states how it can be rebutted. Rebuttal may be accomplished according to the terms of the statute by showing "such premises have been held and possessed adversely to such legal title for ten years before the commencement of the action." *The statute does not allow rebuttal by simply showing that the plaintiff has not been in possession or that the plaintiff has admitted lack of possession.*

Id. at 1452 (emphasis added).

In fact, the complaint herein does no more than allege the historical facts giving rise to the claim of Indian title and allege that "defendants . . . claim an interest in or ownership to a portion of the subject lands and are keeping plaintiff out of possession of its lands . . . . " Complaint, ¶ 22 at 6. These allegations of dispossession, stated in the present tense,[1] give rise to no inference of actual knowledge by the Tribe of the adverse possession of these particular claimants, or the specific predecessors through whom they claim, during any particular time period. The Tribe's allegations merely preserve its claim to trespass damages against whichever parties it proves were wrongfully in possession of its property for whatever time period they are proven to have been in wrongful possession.

The Catawba Indian Tribe has never acquiesced in or conceded its wrongful dispossession by the State and respondents' predecessors. For 150 years, the Tribe has persistently sought redress from the State and Federal governments. *See South Carolina v. Catawba Indian Tribe,* 476 U.S. 498, 504-505 (1986) (Blackmun, J., dissenting).

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[1] Respondents' assertion that the Tribe has alleged that respondents "committed 'trespass . . . for the entire period of their dispossession' . . . " is misleading. Opp. Br. at 10. Respondents' artful use of ellipses distorts the quoted phrase. In fact, the Tribe's prayer simply seeks "trespass damages, including the amount of the fair rental value and profits for each portion of the subject land claimed by any defendant for the entire period of plaintiff's dispossession. . . . " Complaint, ¶ 4 at 7. This prayer plainly seeks recovery only for the period of the Tribe's dispossession by that defendant.

II. NEITHER RULE 701 NOR 704 FED. R. EVID. SANCTIONS A BARE ASSERTION OF ULTIMATE FACT TO ESTABLISH A *PRIMA FACIE* CASE.

Respondents mistakenly argue that the Federal Rules of Evidence sanction conclusory testimony by a claimant to establish adverse possession. Opp. Br. at 9. This argument ignores the applicable substantive adverse possession of law of South Carolina which requires that adverse possession be proven by showing the existence of specific acts of possession justifying such a finding. *Weston v. Morgan*, 162 S.C. 177, 160 S.E. 436 (1936); *Dickson v. Epps*, 104 S.C. 381, 89 S.E. 354 (1916); *Mahoney v. Southern Railway Carolina Div.*, 82 S.C. 215, 64 S.E. 228 (1909); *Burnett v. Crawford*, 50 S.C. 161, 27 S.E. 645 (1897); *Fore v. Berry*, 94 S.C. 71, 78 S.E. 706 (1913) (rejecting testimony that property had been possessed openly, adversely and exclusively because it stated conclusions of law and was too general to warrant a finding of adverse possession).

The Federal Rules of Evidence do not aid respondents' argument. While lay opinions and opinions on the ultimate issue are allowed, under certain circumstances, by Rules 701 and 704, conclusory averments, standing alone, do not satisfy a movant's burden under Rule 56. *See Maldonado v. Ramirez*, 757 F.2d 48, 51 (3d Cir. 1985); *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291, 295 (5th Cir. 1987); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984). This is particularly so when the terms used by the witness have a "separate, distinct and specialized meaning in the law different from that present in the vernacular. If they do, exclusion is appropriate." *Torres v. County of Oakland*, 758 F.2d 147, 151 (6th Cir. 1985). In this case the elements of adverse possession set

forth under South Carolina adverse possession law plainly have special legal meaning peculiar to that context.[2]

Neither the substantive law of South Carolina, the Federal Rules of Evidence nor the Federal Rules of Civil

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[2] Testimony in the form of opinions or inferences are allowed by laymen under the Federal Rules of Evidence only when "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Rule 701 Fed. R. Evid. In this case, the affidavits submitted by respondents simply recite the elements of adverse possession and, for the most part, present nothing by way of evidentiary fact. As such they have no value in aiding the jury to understand testimony. Such assertions "amount to little more than choosing up sides, and exclusion for lack of helpfulness is called for by the rule." Advisory Committee's Note to Fed. R. Evid. 701.

In addition, the Advisory Committee's Notes to Rule 704 Fed. R. Evid. state that the helpfulness provisions "afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria." *See United States v. Cecil*, 836 F.2d 1431 (4th Cir. 1988).

Procedure sanction respondents' use of conclusory affidavits to support a judgment on adverse possession.

Dated this 26th day of February, 1993.

Respectfully submitted,

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